PETITION NOT PRINTED

TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 175

ELMER SAMUEL CHAPMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED FEBRUARY 6, 1960

CERTIORARI GRANTED JUNE 27, 1960

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 175

ELMER SAMUEL CHAPMAN, PETITIONER,

vs.

UNITED STATES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

INDEX

	Original	Print
Record from the United States District Court for the District of Georgia	1	1
Indictment with endorsements of pleas and verdict	3	1
Motion to suppress evidence	5	3
Motion to amend motion to suppress evidence and ruling thereon	6	4
Transcript of testimony on motion to suppress evidence	7	5
Colloquy between Court and counsel	7	5
Testimony of S. B. Chance—		
Direct	11	7
Cross	41	26
Testimony of Hugh G. Merrill—		
Direct	47	30
Cross	62	40
Testimony of Ralph E. Reagan—		
Direct	67	42
Cross	69	43
Testimony of Jack R. Harbin—		
Direct	72	45
Cross	80	51
Redirect	84	53
Colloquy between Court and counsel	92	59

	Original	Print
Record from the United States District Court for the Middle District of Georgia—Continued		
Order overruling motion to suppress	97	61
Transcript of testimony on merits	98	62
Testimony of Jack Robert Harbin—		
Direct	98	62
Cross	108	63
Testimony of Hugh G. Merrill—		
Direct	122	68
Testimony of Roy Earl Bridgaman—		
Direct	162	71
Cross	165	73
Testimony of Ralph Emmett Reagan—		
Direct	167	74
Judgment and commitment	190	76
Judgment of acquittal as to Count 4	191	77
Notice of appeal	192	78
Proceedings in the United States Court of Appeals for the Fifth Circuit	199	79
Argument and submission	199	79
Opinion, Tuttle, J.	200	79
Judgment	205	83
Petition for rehearing	207	83
Opinion on denial of petition for rehearing, per curiam	211	86
Order granting motion for leave to proceed in forma pauperis and petition for certiorari	213	87

[fols. 1-3] INDICTMENT FOR INTERNAL REVENUE VIOLATION

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION — TERM, 19 —

No. 7542

UNITED STATES OF AMERICA,

vs.

ELMER SAMUEL CHAPMAN

INDICTMENT PLEAS & VERDICT

The Grand Jury Charges:

Count One

On or about the 16th day of February, 1958, in the Macon Division of the Middle District of Georgia and within the jurisdiction of this Court, Elmer Samuel Chapman did have in his possession and custody and under his control a still and distilling apparatus for the production of spirituous liquors, set up without having the same registered as required by law, in violation of Internal Revenue Code of 1954, Sections 5174, 5601.

Count Two

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said Elmer Samuel Chapman carrid on the business of a distiller of spirituous liquors without having given bond as required by law, in violation of Interrnal Revenue Code of 1954, Section 5606.

Count Three

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said Elmer Samuel Chapman engaged in and carried on the business of a distiller of spirituous liquors with intent to defraud the United States of the tax imposed thereon, in violation of Internal Revenue Code, Section 5606.

Count Four

And the Grand Jury further charges that at the time and place and within the jurisdiction aforesaid, the said Elmer Samuel Chapman worked in a distillery for the production of spirituous liquors upon which no sign bearing the words "'Registered Distillery'' was placed and kept, as required by law, in violation of Internal Revenue Code of 1954, Section 5681.

A True Bill.

/s/ Chester J. Comer, Foreman of the Grand Jury.

/s/ Floyd M. Buford, Assistant United States Attorney.

[fol. 4] United States District Court, Middle District of Georgia, Macon Division

No. 7542

The United States of America,

vs.

Elmer Samuel Chapman

Indictment

Vio.: 26 USC 5174, 5601, 5606, 5681

A true bill.

Chester J. Comer, Foreman.

Filed in open court this 8 day of August, A. D., 1958.
John P. Cowart, Clerk.

Plea

I, Elmer Samuel Chapman, having been advised of my Constitutional rights, and having had the charges herein stated to me, plead not guilty In Open Court, this 31 day of March, 1959.

J. Sewell Elliott, Attorney for Defendant.

VERDICT

We the jury find the defendant Elmer Samuel Chapman not guilty on count four and Guilty on counts one, two and three, this 22 day of April, 1959.

H. I. Bell, Jr., Foreman.

[fol. 5] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

[Title omitted]

MOTION TO SUPRESS EVIDENCE—Filed October 20, 1958

Comes Now, Elmer Samuel Chapman, by and through his attorney, J. Sewell Elliott, under the provisions of Rule 41(e), F. R. Crim, P., and does move this court to suppress for use all evidence obtained by an unlawful search and seizure of a private dwelling without warrant. This defendant does specifically disclaim that said dwelling was his own or that it was under his custody and control at the time of the search but does admit that he leased said premises for a friend and not for his own use and does rely upon this motion in view of the obvious contention of the United States of America to the contrary.

This 20th day of October, 1958.

Respectfully submitted, /s/ J. Sewell Elliott.

[File endorsement omitted.]

[fol. 6] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

[Title omitted]

MOTION TO AMEND TO SUPPRESS EVIDENCE—Filed April 20, 1959

Comes Now Elmer Samuel Chapman, by and through his attorney, J. Sewell Elliott, and does move this court for leave to amend petitioner's Motion to Suppress Evidence dated and filed herein on October 20, 1958, by deleting from the body of said Motion (1) the wording "of a private dwelling" and (2) the second sentence thereof and inserting in its stead the following:

> "This defendant does show that said unlawful search and seizure was effectuated on February 16, 1958, upon premises known as the Bridgman house, Airport Cross Road, Macon, Georgia. Petitioner does show that at the time of said search he was the lessee of the premises."

This the 20th day of April, 1959.

/s/ J. Sewell Elliott.

ORDER

The Above and forgoing Motion to Amend Motion to Suppress Evidence having been read and considered, it is hereby ordered that the same be and is hereby allowed.

This the 20 day of April, 1959.

/s/ W. R. Brottle, United States District Judge.

CERTIFICATE OF SERVICE

I, J. Sewell Elliott, do hereby certify that I have on this date served the United States Attorney, Middle District of Georgia, with a copy of the within and foregoing Motion by delivering same to his office, Post Office Building, Macon, Georgia.

This 20th day of April, 1959.

/s/ J. Sewell Elliott.

[File endorsement omitted.]

[fol. 7] IN UNITED STATES DISTRICT COURT

Transcript of Testimony on Motion to Suppress

(April 20, 1959, 2:30 p.m.)

COLLOQUY BETWEEN COURT AND COUNSEL

The Court: All right, Mr. Elliott, are you ready?

Mr. Elliott: If Your Honor please, I talked to Mr. Buford about the witnesses last week and he assured me he would have them here. I have checked out in the hall and I understand Mr. Chance is here but Mr. Harbin, there is some confusion and he understood it was 4:30 rather than 2:30. They have sent for him but he has not arrived. I anticipate, unless we can reach some agreement as to the facts, that I'll need Mr. Harbin. With that reservation I'll state that I'm ready.

The Court: Do you have some witness you can start with?

Mr. Elliott: Yes sir. First, Your Honor, I would like to say this, that I have endeavored to determine the facts of this search and seizure. I have been able to determine certain facts and unable to determine others. The federal agents prefer not to talk to me about this case, not to go into it with me until in the courtroom, so there was nothing I could do about it. I did get a few facts from Mr. Harbin, who was kind enough——

The Court: Well, don't you reckon you had better give them to me from the witness stand so we'll have a record?

Mr. Elliott: That is all right, sir.

The Court: All right, let's proceed.

[fol. 8] Mr. Elliott: I'd like to first bring to the attention of the Court a motion to amend my motion to suppress evidence which I have filed. This motion, which I'll present at this time, was filed this morning. There is another motion which I filed last week. I thought best though to incorporate the new matters in a new motion so that it will comprise all of my motion to amend and the one that was filed last Friday I ask the Court to overrule, or ask the Clerk to dismiss it, whichever would be proper.

Mr. Buford: If Your Honor please, I would like to make this statement. This original motion, I would like to call it to Your Honor's attention that in the second

sentence thereof counsel has alleged that this defendant does specifically disclaim that said dwelling was his own or that it was under his custody and control at the time of the search but does admit that he leased said premises for a friend and not for his own use and does rely upon this motion. Of course, that was the basis of what I submitted my brief to you on and, of course, I'm just pointing that out to you, that he was wanting to pull back in this proposed amendment here some things that he has already alleged in his original motion, but we still contend that our brief adequately deals with the situation as I called it to your attention in my letter to you, that I briefed every possible question I thought could be raised since I didn't have any idea what he was contending.

[fol. 9] The Court: So now we are dealing with a building that is not a private residence and of which your client is lessee. Is that right?

Mr. Elliott: May it please the Court——

The Court: I mean, is that the situation?

Mr. Elliott: We are dealing with a building and I would like to hand to the Clerk at this time two photographs and I would like to state in my place they are photographs of the building in question. I would like for the District Attorney to examine those. (handing photos to District Attorney)

Mr. Buford: Where is Mr. Williams? (showing photographs to Mr. Williams and handing them back to Mr. Elliott.) I have no objections to the pictures.

Clerk: Photographs marked *D-1* and *D-2*.

Mr. Elliott: May it please the Court, those are pictures which I state in my place are the dwelling that was searched, and I introduce those at this time in view of the Court's statement that has just been made. It is my contention that that residential house there, which is plainly a residential house, not a place of business of any sort but a residential house in a residential district, is the house that was searched and at the time my client, Mr. Chapman, was the lessee of those premises.

The Court: I didn't make any statement. I just asked you if we were dealing now with premises which were not [fol. 10] a private dwelling.

Mr. Elliott: Those are the premises we are dealing with, Your Honor.

The Court: Why did you amend your petition to strike the description of it as a private dwelling.

Mr. Elliott: Because, Your Honor, that is the house that we are referring to. Mr. Chapman had not visited that house for sometime, although he had a right to do so, and it is not within—he is not able to allege either one way or the other as to whether it was a residence at that time or not, or whose residence it was.

The Court: I see. All right are you ready to proceed?

Mr. Elliott: I would like to call Mr. Harbin to the stand.

While we're waiting, Your Honor, I have the brief filed by the Government. As I said, I haven't been able to develop our factual situation because these folks won't talk to me. But as I understand from the brief of the Government, they admit that Chapman was the lessee of the premises and I would like to know if there is any question about that?

Mr. Buford: I didn't understand.

Mr. Elliott: I was wondering if in view of your brief that you would be willing to stipulate that Mr. Chapman was the lessee of the premises?

Mr. Buford: I suspect you better make out your motion [fol. 11] because I haven't had a chance to talk to the witnesses about this case. I wrote the brief about ten days ago and I don't remember all of the facts.

Marshal: Mr. Harbin doesn't answer, Your Honor.

The Court: If these witnesses are not here we'd better pass this case and call another one.

Mr. Elliott: Call Mr. Chance.

Mr. S. B. Chance, being called by the Movant and having been duly sworn, testified as follows:

Direct examination.

By Mr. Elliott:

Q. Mr. Chance, what is your full name?
A. Silas B. Chance.
Q. And what is your position?
A. Well, I was at that time a state revenue agent.
Q. Now, on—is that what your are now?

A. No sir, I'm not one now.

Q. What are you now?

A. I have not been with them since October. Sir?

Q. What are you now?

A. I'm self-employed.

Q. You're not connected with the revenue department either state or federal government in any way at this time?

A. No sir.

Q. Now, on February 16, 1958, what were you?

[fol. 12] A. I was a state revenue agent.

Q. State revenue agent for the State of Georgia?

A. Yes sir.

Q. Now, on that date, February 16, 1958, in the pursuance of your duties as a state revenue agent did you have the—did you search a house located out on the Airport Cross Roads, across from Cochran Field?

A. Well, I was called out there. There was a man lived out there named Mr. Briscoi. He told me on that Sunday evening if I would get out there by five o'clock he would carry me and show me a still.

Q. What time was that?

A. Around four. Said he had to go to Sunday school, if I would get there—and I met Jack Harbin out at the station house and we went on out.

Q. He called you at four?

A. Around that, but he said get there before five.

Q. Did you go by and pick him up?

A. I went by and picked Jack up and picked the man up. He said he owned the house.

Q. Go ahead and give us the details.

A. Well, he said he owned the house and he went down there to invite the new comers—he thought someone had moved in there.

Q. Were you there at the time?

[fol. 13] A. Yes sir.

Q. When he went down there——

A. Yes sir.

Q. —the first time

A. I was with him, and er—to invite them to Sunday school and he found out there was a still in there and he came back and called us and went with us down there.

Q. Were you there when he first went down there?

A. Yes sir.

Q. If I understand you, he went down to invite some newcomers to come to church?

A. Sunday school he said.

Q. Did you go with him?

A. I went with him and we found the still, smelled it in there and Mr. Harbin——

Q. Mr. Chance, I don't want to lead you, but I want to make it clear, because you apparently don't understand what I mean. As I—and I'm not attempting to lead you, but I want to make myself clear. He went down to invite some newcomers to come to church?

A. To church, or Sunday school, or something.

Q. Were you with him at that time?

A. Yes sir. I was with him.

Q. At that time?

A. Not at the time he went to invite them.

[fol. 14] Q. All right, sir. I don't want you to testify about anything but what you know.

A. That's right. He came back then and called us.

Q. In other words, you received a telephone call from Mr. Bridgman?

A. That's right.

Q. And what did he tell you?

A. Well, he said he thought there was a still in there, he smelled all that mash down there.

Q. I see.

A. And he carried us down there to the house.

Q. And that was four o'clock when he called?

A. Something like that. I won't be positive about the time, but he said get there before five, I know, because he said he had to leave home——

Q. Then what did you do?

A. Well, we went down there and Mr. Harbin crawled in at the window and found the still there and I carried the man back home.

Q. Wait a minute, slow down so I can get the details. Who went down to the house with you?

A. With me? Jack Harbin and Mr. Briscol.

The Court: Is that the fellow——

A. Mr. Braskil, I think.

Q. Was it Bridgman?

[fol. 15] A. Bridgman. He said he owned the house, some rental company rented the house, to farm, you know.

Q. He told you that house was owned by him but it was rented out?

A. Yes sir.

Q. And the three of you went down there?

A. Yes sir.

Q. When you got there—did you go in one car, all three of you?

A. Yes sir, my car.

Q. And when you got down there what happened?

A. Well, we found it, and we——

Q. Wait, tell us in detail what you did.

A. Didn't do nothing, only we went down there and smelled it and pushed up a window and went in there. Mr. Harbin went in. I didn't go in.

Q. Did you look in the window?

A. You couldn't see nothing for those shades.

Q. Shades in the windows?

A. Had shades in every window.

Q. You couldn't see anything in the house?

A. No sir.

Q. Did you try to look in the window?

A. Yes sir, we tried, but you couldn't see. And Mr. Jack, I think found a window that he could get in around in the toilet part somewhere.

[fol. 16] Q. All right. Now, did you try to look in the windows yourself?

A. Yes sir.

Q. Did Mr. Bridgman try?

A. Yes sir.

Q. Did Mr. Harbin?

A. You couldn't see anything from the outside.

Q. Did you go around the house?

A. Yes sir.

Q. You went around the house and couldn't see anything, and then did you see Mr. Harbin go in through the window?

A. Yes sir, I saw him.

Q. Was that the first window that he tried to get into?

A. Well, I don't know whether it was the first one or not, but it was the only one he found he could get in.

Q. Did you see him try other windows?

A. Well, I didn't see him try at every window. I just saw him push that one up.

Q. No, I'm asking did you see him try any other windows?

A. I won't say for sure. He tried—I was on one side of the house and him on the other, but when I saw him he was going in the window.

Q. Were you over there trying windows, too?

A. No sir, I couldn't reach up there.

Q. What were you doing over there?

A. I was just walking around.

[fol. 17] Q. Did you see him go in through that window?

A. Yes sir.

Q. You were standing there when he went in?

A. Yes sir.

Q. And he raised the window before he went in?

A. Yes sir.

Q. And then what happened?

A. Well, he told me to come on back to town and get some help. And I carried the man——

Q. Wait a minute now, let's get the whole story. He went in and what did you do?

A. I didn't never go in. He just told me it was in there, see.

Q. When was the next time you saw him after he crawled through this window?

A. When I went back with Mr.—think it was Mr. Wally and them, and we——

Q. In other words, when he disappeared in that window you didn't see him again?

A. I didn't go in there. He told me to slip on away and I left as fast as I could, carried the man back home and come and got these boys to go back with me, and when we got there he had Mr. Chapman arrested and setting in the car there when we got back.

Q. I see. Now, did you go in the house at all then?

A. No sir, I didn't go in the house at all.

[fol. 18] Q. Did he come to the door after he crawled through the window?

A. Who was that?

Q. I'm talking about Mr. Harbin.

A. No sir, the door was locked.

Q. Door was locked?

A. Couldn't get in the door.

Q. Did he open the door?

A. No sir.

Q. In other words, he just yelled out and——

A. And told me to get away quick enough and I got away as quick as I could.

Q. What did he mean by that?

A. Well, go get some help and come back.

Q. So you left to get some help. Now, where were you going to get that help?

A. Well, I called the federal boys.

Q. In other words, you left there to call the federal boys?

A. Yes sir.

Q. And you came on to town. Now, where—did you call the federal boys?

A. Yes sir, I called them and some of our boys, Mr. Godfrey and Mr. Elder came out there, too, I think.

Q. Where did you call the federal boys from?

A. From the office down on Fifth Street.

Q. You drove on to town?

A. Yes sir.

[fol. 19] Q. Now, how did you drive back with reference to speed?

A. Well, I didn't drive over the speed, but I just drove on back as quick as I could.

Q. Quick as you could. Did you have a siren on your car?

A. Yes sir.

Q. Did you use it?

A. No sir.

Q. Well, you came on back to town in a hurry, didn't you?

A. Well, I didn't come in all that big a hurry.

Q. Now, what about Mr. Bridgman, what happened to him?

A. Well, I put him out at home.

Q. Put him out at his house?

A. Back at his home.

Q. Put him out and came on to town?

A. Come to town.

Q. And as soon as you got back you called the federal boys?

A. Yes sir.

Q. What did you tell them?

A. Well, I told them what we found out there, see.

Q. Did you have a search warrant?

A. No sir,

Q. What about Mr. Harbin, did he have one?

A. No sir, not that I know of.

Q. Did you have time to get a search warrant?

A. Did I have—it was on Sunday afternoon.

[fol. 20] Q. Well, you can get a search warrant on Sunday afternoon, can't you?

A. I don't think you can. I haven't never got one on Sunday.

Q. You didn't make any attempt to get any search warrant, did you?

A. Well, I didn't feel no call to get one. The man that owned the house, he was there and he told us to go in the window and see what what in there, so we went on in.

Q. He told you that house was leased out. Did he tell you who to?

A. He said he understood it was rented out and he went down there to invite the people to come to church or Sunday school.

Q. I understand, but you didn't have a search warrant and Mr. Harbin didn't have any, and Mr. Harbin went in that house. Is that right?

A. That's right.

Q. And then you—he told you immediately to go call the federal men. Is that right?

A. Yeah, go get some help. He didn't say who to call, and I called the federal boys and some of ours——

Q. But you were on your way to call the federal men when you left there. Did he indicate to you what size still it was before you left?

A. Who, Mr. Harbin?

Q. Yeah.

[fol. 21] A. He said it was a big still.

Q. Big still. Well, is it your common practice, or was it, as a state man to turn over big cases, big liquor cases to the federal men?

A. Yes sir.

Q. That was your practice at that time?

A. Yes sir.

Q. And you understood that and you frequently did that?

A. Yes sir, we turned over a lot of them to them.

Q. In other words, it was a common understanding that you would work together with the federal men?

A. Well, we worked together, yes sir.

Q. And when you find a big still or a case of any substantial size you turn it over to the federal men; is that right?

A. Yes sir, we turned a lot of them over to them.

Q. Will you answer my question. That was the common understanding that you all had between you?

A. Who had between——

Q. You had with the——

A. I didn't have any understanding between the federal at all.

Q. I beg your pardon?

A. I say our bossman always told us, Mr. Johnny Smith, he told us whether to put the case in the federal or—he was the one, but I wasn't under no agreement with the federal, you see. We hoped one another, and Mr. Smith [fol. 22] told us to put them cases in the federal——

Q. He told you a case like that to turn over to the federal men?

A. Yes sir.

Q. And that is what you were doing, carrying out his instructions?

A. (Witness nodded.)

Q. Now, did he go in that house? Was there anybody in that house at that time?

A. There wasn't nobody in there.

Q. Do you know there wasn't?

A. I don't know that there wasn't, but he said there wasn't.

Q. Did you hear anybody in there?

A. No sir, I didn't hear nothing.

Q. Was there any violence going on there in any way? In other words, if there wasn't anybody there, there couldn't have been any violence, could there?

A. No sir.

Q. There wasn't any vehicle involved. This house was on the ground out there just like any other house, it couldn't move off anywhere, could it?

A. (No answer.)

Q. Nobody was there and so therefore nobody was

threatening any destruction of that still or anything that might be in the house, were they?

A. No.

[fol. 23] Q. Is it possible you all could have placed a guard on that house and come back to town before you entered it? Is there any reason why that could have not been done?

A. Well, you'd have been seen around there. It's open and people live right close to it.

Q. There were three of you out there, weren't there?

A. Yes sir.

Q. In other words, you did have the opportunity to place a guard on that house and then you go on and get the help or one of you go get the help that you wanted, couldn't you?

A. Well, we could have got seen, just like I say. We didn't undertake nothing like that.

Q. Now, you had a gun on, didn't you?

A. Yes sir.

Q. Did Mr. Harbin have a gun on him?

A. Yes sir.

Q. How many guns did you have?

A. One, just my gun I carry.

Q. Was that a pistol?

A. Yes sir.

Q. Did you have any other guns in the car?

A. No sir.

Q. Mr. Harbin, he had a gun?

A. Yes sir.

Q. Is that the only one he had?

[fol. 24] A. I guess it was.

Q. Now, did you come on back out there with the federal agents?

A. Yes sir, I went back.

Q. Did you all go in the same car?

A. Yes sir.

Q. How many of you were in the car?

A. I don't remember how many there were. Mr. Godfrey and Mr. Elder, they came in their car.

Q. Who is that?

A. I think Mr. Godfrey and Mr. Elder and them came in their car, but me and the federal boys went back together.

Q. In other words, you rode with the federal boys. Was Mr. Merrill with you?

A. Yeah.

Q. Mr. Higginbotham with you?

A. I don't remember just exactly which ones of them. Mr. Merrill and Mr. Williams—Mr. Williams, I think.

Q. Mr. Merrill and Mr. Williams were there. What about Mr. Higginbotham?

A. I don't remember whether they was all there or not; to tell you the truth.

Q. Now, you went in the car with the federal agents. Now, whose car was that?

A. Whose car? Well, I don't know, sir. The federal government's car they tell me, the ones they ride in.

[fol. 25] Q. It wasn't a state car. It was a government car?

A. My car, it was my car, wasn't no state car or federal government.

Q. Well, that is all I wanted to know.

A. I just traded for that car on the 17th. I hated to drive it.

Q. Who was driving the car, Mr. Chance?

A. I was driving my car.

Q. You drove the car, and the three—some federal agents were in the car with you?

A. That's right.

Q. Now, there was another car. Now, who was in that other car?

A. Well, I don't remember.

Q. Well, you just named two people while ago, and I didn't catch the names.

A. I would have to see my statement to find out all about it.

Q. Have you got it with you?

A. No sir, I haven't.

Q. Well now, you just named two names awhile ago, what were they?

A. Well, Mr. Williams I know——

Q. I'm not talking about the federal agents now.

A. Mr. Godfrey and Mr. Elder came out later.

Q. Mr. Godfrey?

A. Yes sir.

[fol. 26] Q. And Mr. who?

A. Elder.

Q. How do you spell it?

A. Well, E-l-d-e-r.

Q. E-l-d-e-r. Mr. Elder and Mr. Godfrey?

A. Yes sir:

Q. Who are they? Are they state agents or federal?

A. Mr. Elder was a state agent and Mr. Godfrey was a city police that worked with us.

Q. Godfrey was a city policeman, and Mr. Elder——

A. Was a state agent.

Q. State revenue agent. Now, what time did you and the federal agents arrive back on the scene?

A. We got there just before dark.

Q. What time was that?

A. Well, I wouldn't say just when, because we sort of lingered along, you know, for dark to catch us.

Q. I see. You got back about dark. Now, what time did Godfrey and Elder come there?

A. Well, they came in later.

Q. About how much later?

A. I don't remember just how late, maybe an hour or so.

Q. An hour or so after you all got there?

A. (No answer.)

Q. All right, when you and Mr. Merrill and Mr. Williams —and you're not sure about Mr. Higginbotham—but when [fol. 27] you and Mr. Merrill and Mr. Williams got back there, what did you see?

A. Well, we saw that big still in the house there.

Q. Well, tell me exactly what happened. See, I wasn't out there. I want to know what happened.

A. Well, I say there was a big still in the house.

Q. In other words, you went in the door?

A. That's right.

Q. Who went in the door first?

A. I don't remember that.

Q. Did the federal agent go in before you went in?

A. I don't remember which one.

Q. Was the door open then?

A. They had the door open, see, then.

Q. Who opened that door, you know?

A. I said Mr. Chapman come there with the key and opened it and come in there.

Q. But the door was open when you got there. Now, where was Harbin at that time?

A. Harbin was out there on the front in the car.
Q. In the car?
A. I think he was in the car.
Q. Who was with him?
A. Him and Mr. Chapman.
[fol. 28] Q. In other words, him and Mr. Chapman were sitting out in front in the car?
A. Yeah.
Q. After you left there, did you hear from Mr. Harbin before you got back out there?
A. Did I hear from him?
Q. Did he contact you in any way?
A. No sir.
Q. You had not seen him or heard from him since you left the first time and got back and he was sitting out in front with Mr. Chapman in the car?
A. Yes sir.
Q. And then what did you all do? Did you all go in the house?
A. Yeah.
Q. Did you look around the house?
A. Well, we just looked around, destroyed what was there.
Q. What was there?
A. Well, there was a big still there.
Q. Where was the still?
A. Mash and stuff.
Q. In what room?
A. It was in the room going in at the front.
Q. Come in the front door and there is a front room up there?
A. Two big vats built there. The still was all in the front room.
[fol. 29] Q. Now, was anything else in there?
A. Well, they had a water pump and water hose and everything else connected up in there together with a still.
Q. All right. Now, other than the still was there anything else there?
A. Anything else?
Q. Yeah.
A. I didn't see nothing else but just——
Q. Did you see any canned goods there?
A. Yeah, they had some stuff in there.

Q. Now, I just want you to tell me what you found there. That is all. What was that? You say the still was there and all this apparatus that goes with a still. What else was there?

A. That is all that was there.

Q. Huh?

A. That was all.

Q. Well, were they any canned good there?

A. Well, I think there was a little old something in a sack there like canned goods you call them.

Q. Where was that?

A. In a little room right next to the——

Q. Let me try to refresh your memory a little here. You go in the front door and there is a living room, is that right?

A. Yeah, I reckon.

[fol. 30] Q. Right large room. Do you remember that there is a dining room right behind the living room and a kitchen right behind that? You remember that?

A. Yeah, I know you walk right in the front door and he had them vats fastened up to the chimney and all that.

Q. I understand that, and over on the other side of the house there were two bedrooms with a bathroom in between?

A. Yeah.

Q. You remember that?

A. I remember all them rooms.

Q. And that was the layout of the house. You go in the front door into the living room, dining room behind the living room, kitchen behind the dining room, and then on the other side of the house there was a bedroom and a bath in between and then another bedroom. Is that correct?

A. Yeah.

Q. Am I stating that right?

A. Something like that.

Q. First you went in that living room and you found the still. Was there anything else in that living room other than that still?

A. I just saw a whole lot of barrels and all that kind of stuff.

Q. Huh?

A. Barrels, wood in there to build a fire. We built a fire.

Q. What I'm trying to do—I understand about the still, but I'm trying to get some evidence of anything else that

you found in there. Were there any canned goods in the [fol. 31] living room?

A. Well, I don't know whether they was in the living room. There was some there in an old sack somewhere.

Q. Somewhere. All right. Now, was there—you don't remember where those canned goods were?

A. I don't remember just exactly.

Q. Was it in the kitchen?

A. I don't remember whether they were in the kitchen or there next to the still. I don't remember just exactly where they found it.

Q. As a matter of fact, the matter was in the federal government's hands then and you weren't too much interested in where those things were, were you?

A. No sir, it was in our hands because we had found it.

Q. Yeah. You had already turned it over to the federal government, hadn't you?

A. No sir.

Q. Well, you don't even remember where things were in the house, do you, Mr. Chance?

A. Well, I remember——

Q. If you do I want you to tell me.

A. I——

Q. Now, I want to know what you found in that house. You say you found some canned goods. I want to know where they were?

[fol. 32] A. I told you I don't know.

Q. Well, who found it in that house?

A. I told you I couldn't say that.

Q. But it wasn't you?

A. Well, I don't recall that it was me found them, no sir. I saw them all right.

Q. Isn't it true you took a back seat in this thing after the federal officers got there?

A. Back seat?

Q. Yeah. I mean by that——

A. I don't think I did.

Q. —you left it up to the federal officers?

A. No sir.

Q. Well, that's what you were instructed to do by your head man, weren't you?

A. Well, we're instructed to turn the cases over to the federal——

Q. That's right, and that is what you did?

A. Yes sir.

Q. Just exactly what you're supposed to do.

A. And they went out and hoped us destroy it.

Q. That's right. All right. Now, there were some canned goods and food. Any other food other than canned goods?

A. No sir, I didn't see any.

Q. There were some sacks of things there. Is that right?

A. Well, if there was I didn't see them. Some sacks, [fol. 33] little old wheat bran sacks.

Q. But there was——

A. All kinds of things that went with a still.

Q. Now what about a bed. Was there a bed in there?

A. I didn't see a bed.

Q. As a matter of fact, Mr. Chance, you don't remember at all what was really in there, do you?

A. Yes sir, I guess I could remember it all. I got an inventory of it.

Q. I wish you would tell me what you found in that house. That is all I'm trying to get out of you.

A. Like I say, we found all that stuff that goes with a still.

The Court: You say you have an inventory of it?

A. Yes sir, I have one at home, but I haven't got it here.

The Court: You don't have it here?

A. No sir. You know when I send it off for prosecution I have to call out everything we got confiscated, you know.

Q. Well, did you inventory everything, like food, or just inventory the still?

A. Well, we usually inventory everything we destroy.

Q. What you destroyed

A. Yes sir.

Q. Do you destroy food you find in the house?

A. We destroy everything.

Q. Canned goods?

A. Everything we find.

[fol. 34] Q. In other words, you just go in a house and just clean it out and destroy everything you find?

A. If its with that still.

Q. Furniture, food and everything?

A. No, I didn't say that.

Q. Well, what are you saying?

A. I said we destroy everything that went with this still.

Q. That is what I'm asking. Do you just destroy things that are distilling apparatus or do you destroy other things, too?

A. Well, we destroy distilling apparatus.

Q. You do recall that there was some food there?

A. I recall there was some little old sacks of something in there, canned goods or something, sardines or something.

Q. How about bread and stuff, meat?

A. I don't recall that.

Q. You do recall some canned goods in that house?

A. Yeah.

Q. Now, was there anything else that you can recall that you saw in that house?

A. No sir.

Q. Was there any bedding in there?

A. If there were I didn't see it?

Q. Was there a coat in there?

A. I don't remember that.

[fol. 35] Q. What about chairs, any chairs in there?

A. I don't remember that.

Q. Now, after you all got there the case had been adopted by the federal agents and you all just helped them out as they wanted you to. Is that right?

A. (No reply.)

Q. Answer my question, Mr. Chance.

A. What was your question?

A. I said after you all got back there you just helped out the federal agents?

A. Yes sir.

Q. They had adopted the case and you just helped them out.

A. We turned it over to them that next Monday morning when they had a hearing, I think.

Q. All right now, were you there when a Yale lock was taken off of the front door?

A. Was I there when it was taken off? I don't remember.

Q. Do you remember anybody taking a lock off of the door?

A. No sir.

Q. You remember when the federal officers destroyed that still?

A. Yes sir.

Q. And you remember what they held out, what they took away and saved out of what they destroyed?

A. I saw them destroy it out there in the yard——

Q. What did they save?

A. —all that stuff.

[fol. 36] Q. All what stuff?

A. All the stuff that went with that still, vats and things.

Q. I said, what did they save, what did they keep?

A. I didn't see anything they kept.

Q. You didn't keep anything yourself?

A. No sir.

Q. And you didn't see anything they kept?

A. No sir.

Q. In other words, it was the federal officers running the show then, wasn't it?

A. It was all of us——

Q. You didn't keep anything?

A. —us state men, Elder and Godfrey and all of us.

Q. Yeah, but you didn't feel any responsibility for keeping anything because that was up to the federal men then, wasn't it.

A. I don't—how was your question?

Q. I say you don't know what they kep- and you didn't keep anything?

A. Well, I know they didn't keep nothing because I was there.

Q. Did they keep any samples of mash or anything like that?

A. Well, they probably got a gallon of mash.

Q. I'm not talking about probably. Tell me what you know. Now, do you know whether they kept anything and, if so, what did they keep?

[fol. 37] A. Well, they get a sample of the mash and put it in a jar or jug, we always do.

Q. Did you see then do that?

A. I didn't see them personally do that.

Q. You don't know whether they did or not?

A. Well, I know they did it because they usually do it.

Q. I see. Did you see—you didn't do it yourself?

A. No sir.

Q. But the federal agents usually do that? In other words, when they come into a case they decide what they need to keep and what they need to destroy and then they go on and do it, and sometimes you help them?

A. Well, sometimes we carry it down to our office and bring it up here Monday morning when they adopt the case.

Q. In other words, that house had not even been completely searched when those federal officers got there as far as you know, had it? Nothing had been done inside?

A. Jack was the man that was there. He did what was done.

Q. And he was sitting out in the car?

A. That's right.

Q. Now, you don't remember anything about somebody taking a lock off of the front door? You don't know about that?

A. I don't know about that.

Q. In other words, you all didn't—there was no effort [fol. 38] on the part of the state officers to gather together evidence out there after this search and walk in and say "Here, Mr. Federal Government, here is the evidence on a silver platter." You all didn't do that?

A. Yes sir, we——

Q. You called them into the case.

A. We called Mr. Elder and Mr. Elder took pictures of everything, state agents, before we left there.

Q. But your instructions were, by your man, to turn a case like this over to the federal government and that is what you did?

A. Yes sir.

Q. Now, this was a residental house, was it not? I want to show you these pictures here. Are these pictures, Deft. Ex. Nos. 1 and 2, are those pictures of that house?

A. Looks like it, yes sir.

Q. Was that out in a residential area?

A. There was a house close to it there, not too far from it.

Q. What's that?

A. There's another house right up above it, where people live.

Q. That's a residential area out there?

A. It was down in the woods.

Q. There are residential houses all up and down that road out there in that area.

[fol. 39] A. It was all out in the woods there, the house was.

Q. But it's a wooded residential area?

A. That's right.

Q. How far was this house from the main road there?

A. Well, it wasn't too far.

Q. About how far?

A. About out there to the street or somewhere.

Q. Tell me how many feet it was?

A. Well, I won't say how many feet, but it ain't far from the road.

Q. Well, look down there. Was it futher than from here to the back of the courtroom?

A. Yes sir, little futher, I think.

Q. You could plainly see it from the road?

A. That's right.

Q. Can you look at these pictures and tell that they were taken from the road?

A. I don't remember. I can't tell that.

Q. I know. I took those pictures, you didn't, but I'm trying to get some idea. Were those pictures taken from the road or not?

A. I don't know sir.

Q. Was the house about that far from the road?

A. There was a—it was off from the road just a little ways.

Q. You could see it plainly from the road, off the road just a little ways?

[fol. 40] A. Yes sir, you could see it.

Q. Approximately as far from here to the back of the courtroom? Is that right?

A. Something like that, something like out there in the street.

Q. Something like fifty to seventy-five feet would you say, Mr. Chance?

A. Looked like it was futher than fifty- or seventy-five feet.

Q. What would you say, a hundred feet?

A. I would say two or three hundred feet from the road. You turned off and went around down in there to the house.

Q. Mr. Chance, you know how far to—come here just a minute. I want you to look out the window. You see that Bibb Liquor Store over across the road, the street there. Was it that far?

A. I say it was about as far as from here out in the street

Q. Wasn't that far?

A. How far you say that is to the street?

Q. I'm just trying to get some idea as to how far it was. Was it as far as that Bibb Liquor Store?

A. No sir. As far as that street that runs along there.

Q. Now there are two streets out there with a park in the center.

A. I mean this one on this side.

Q. You mean this side?

A. Yes sir.

[fol. 41] Q. You mean this side?

A. Yes sir.

Q. In other words, about half way from here to that store?

A. Yes sir.

Mr. Elliott: I would like to have the record show, Your Honor, that we are standing in the courtroom and this witness has said the house was approximately from the court room out to the close side of Mulberry Street.

A. Well, I don't know just exactly, but that is my idea about it.

Q. That is what I want, your idea, Mr. Chance.

Mr. Buford: If your Honor please, I would like to ask Mr. Chance just a couple of questions, please sir.

Cross-examination.

By Mr. Buford:

Q. I don't want to ask you but two or three questions here. Mr. Bridgman, the owner of the house, you said, made the complaint or observation to you that he had reason to believe whiskey or a still was in this house?

A. Yes sir.

Q. And did you go up to the house?

A. Yes sir.

Q. And as you approached the house did you smell any whiskey or anything?

A. Yes sir.

[fol: 42] Q. What did you smell?

A. I smelled that mash and stuff, fact he smelled it before he called us up, that is why he called us. He walked around the house——

Q. Did you recognize it as being whiskey?

A. Yes sir.

Q. Whiskey smell?

A. That's right.

Q. All right, sir, let me ask you this. That was before anybody looked in the windows or anything?

A. That's right.

Q. And did the owner, Mr. Bridgman, tell you to go in there and see about it and see what was in his house?

A. That's right.

Q. All right, sir. After Mr. Harbin went in there, Mr. Harbin saw the still and told you to come get help?

A. That's right.

Q. Mr. Harbin didn't tell you what kind of help to get?

A. That's right, sir.

Q. And you came, drove all the way from out there all the way into town and got some of your fellow officers down there to—that work with Mr. Johnny Smith; is that correct?

A. That's right.

Q. And then you called the federal officers from Mr. Johnny Smith's office here in Macon; is that correct?

[fol. 43] A. That's correct.

Q. Now, were you there when the federal officers got back out there?

A. Yes sir, I rode with them back out there.

Q. I'll ask you was Mr. Chapman under arrest? Had Mr. Harbin already put Chapman under arrest by the time you got back out there?

A. Yes sir, he had him under arrest when we got back.

Q. He was under arrest before the federal officers ever arrived at the scene?

A. That's correct.

Q. And the still had already been located?

A. That's right.

Q. How do you know he was under arrest?

A. Well, Jack Harbin had caught him and held him until we got there. And there was another fellow with him and he outrun him he said.

Q. As I understand your testimony, when you got there Mr. Harbin and Chapman were sitting in the car out in front?

A. He done had him arrested.

Q. Well, how do you know? They were sitting in the car, weren't they?

A. Well, when Mr. Chapman came in the house he grabbed Mr. Chapman.

Q. Were you there?

[fol. 44] A. He said the other man.

Q. Were you there?

A. No sir, I wasn't.

Q. Well, I don't want you to testify to anything but what you saw. You understand that, don't you?

A. Okay.

Q. When you got back Mr. Harbin and Mr. Chapman were sitting in the car; is that right?

A. They was in the car.

Q. And you don't know what happened when Mr. Chapman got there, do you?

A. I know what Jack said, and he had him arrested when I got there.

Q. I'm not talking about what Jack said. I'm talking about what you know. When you got there they were both sitting in the car?

A. Yes sir, and he had him arrested in that car.

Q. How do you know he had him arrested?

A. Well, an officer always arrests a man like that.

Q. Well, you don't know what they did, that's the truth of the matter because you weren't there?

A. Well, I know that that's the usual way.

Q. I'm not talking about what the usual way is, I'm talking about what you know. That's all we're interested in finding out from you today, is what you know.

A. Okay.

[fol. 45] Q. Do you know when Mr. Chapman got there?

A. No sir, I don't know when he got there.

Q. You don't know when he got there, but you high-tailed it to town and called the federal officers as fast as you could?

A. I come back to town and called our officers and the federal officers, too.

Q. Well, you told us while ago you called the federal and then you contacted the state officers?

A. Our state officers came out and Mr. Elder, I believe, he is—and Mr. Godfrey——

Q. Let's not pass over this now. Let's back up just a little bit. You testified, as well as I recall, a few minutes ago that you came on back to town just as fast as you could, you called the federal officers into the case, just like your bossman had instructed you to do.

A. Well, that's right. We called him and er——

Q. That is what you did. Now, when Mr. Chapman arrived out there you don't know——

The Court: He has testified he doesn't know about that.

(Witness excused.)

Mr. Elliott: May it please the Court, as I understand the law a search warrant is required except under certain circumstances, exceptional circumstances, and when a search is made, in some of those circumstances, the burden is on those seeking an exemption from a search warrant to [fol. 46] show that they acted properly in searching that house without a warrant. Now, at sometime in the presentation of this evidence that burden has shifted to the government. Now, I'm going to put Mr. Harbin up on the stand now, if it please the Court——

The Court: Well, has someone called Mr. Harbin? Call him, Mr. Marshal.

Marshal: The report is that they have not been able to get in touch with Mr. Harbin, Your Honor.

The Court: Well, someone who knows tell us, is he a federal officer or state or what?

Mr. Poe: No sir, he is a sheriff over in the Civil Court and he was under the impression when they dismissed the other court that all witnesses were excused and he is out serving papers. We have contacted the sheriff's office over there and they cannot locate him at this time.

Mr. Buford: I'll call to Your Honor's attention there are some three or four other officers here on the same case if counsel wants to use them.

The Court: All right, what do you say, Mr. Elliott? Do you know of any other witness you can use or does this end it, or shall we suspend. Tell me something so we'll know what to do. Of course, counsel is responsible for getting witnesses here.

Mr. Elliott: That's right. I want to point out to the [fol. 47] Court though that I have tried to talk to these federal agents and they won't talk to me.

The Court: Yeah, you have said that. Do you want to call any other witness now or do you want to suspend?

Mr. Elliott: I'll call Mr. Merrill to the stand.

Hugh G. Merrill, being called by the Movant and having been duly sworn, testified as follows:

Direct examination.

By Mr. Elliott:

Q. State your full name.

A. Hugh G. Merrill.

Q. What is your job?

A. I'm an investigator for the Alcohol and Tobacco Tax, United States Treasury Department.

Q. Federal investigator?

A. Yes sir.

Q. Now, were you acting as such on February 16, 1958?

A. Yes sir.

Q. Did you have an occasion to go out the Bridgman house out on the Air Force Cross Road with reference to being contacted by some state officers?

A. Yes sir.

Q. Tell us about what happened, please sir.

A. Well, we received a call that they needed some help and we just went with State Revenue Agent Chance, and [fol. 48] when we got to the house Jack Harbin and Mr. Chapman were sitting in the car. Jack said he had already arrested Mr. Chapman and another man escaped on foot.

Q. Now, what time did you receive a telephone call from Mr. Chance?

A. I don't remember exactly what time it was. It was getting close to dark.

Q. Where were you at that time?

A. I was at home.

Q. Who called you?

A. Mr. Chance, I believe.

Q. What did he say to you?

A. I don't remember exactly what he said. The gist of it was that they had a still in a house and wanted us to help them. So we went with him.

Q. Said he had found a still and wanted you all to help them?

A. Yes sir.

Q. As well as you can, I would like for you to recall the words that he used.

A. I don't remember what words it was. I won't attempt to because it would just be—wouldn't be exactly right. I don't remember the exact words that he used.

Q. Did he indicate the size of the still?

A. I don't recall that. I believe he just said they had a still in a house.

Q. And wanted you all in the case?

[fol. 49] A. Said he wanted us to help them.

Q. Wanted you to help them. What did that mean?

A. It meant help them.

Q. Well, do you know what he meant by that?

A. I always just—when a fellow says he wants you to help him, you just go with him and do what he tells you to do.

Q. I see. So then what happened? Did he come by and pick you up?

A. I think we met him down at their office on Fifth Street.

Q. You met him? Did you go right away?

A. Well er—I had to take time to dress and drive down to the office and then we went on.

Q. Did you call other federal agents?

A. I don't remember whether I called them or Chance called them, or whether one of the agents called me. I just don't remember that.

Q. Did you pick up any on the way down to meet Chance, any federal agents?

A. I just don't remember. Sometimes Investigator Williams keeps a car at his house and other times I keep it at my house, and whichever one had it would pick up the other one.

Q. And you don't remember who picked up who, but one of you did the other?

A. I'm not even sure about that. I'm pretty sure that that's what er——

[fol. 50] Q. Now, did any other federal officer meet you down there?

A. I just don't remember all those details about how we met, but I know——

Q. Well, let's see if we can't remember as much as we can now. Let's remember—let's see if we can't remember who went out there with you.

A. Well, Investigator Williams, and myself, and Herman Higginbotham, and Mr. Chance, and James Elder, and Thomas Godfrey.

Q. Did James Elder go out there with you all?

A. I went and picked him up.

Q. You went and picked him up. Did they go in the same car with you?

A. With me? Now, I don't remember.

Q. Whose car did you go out there in?

A. Went out there in Mr. Chance's car.

Q. Who else was in that car?

A. I don't remember at that time. I think it was myself, Investigators Williams and Higginbotham, and Mr. Chance.

Q. Four of you went out there together, three federal officers and Mr. Chance in Mr. Chance's car,

A. I believe that's right. I don't remember exactly.

Q. Now, how did you get together with Higginbotham?

A. He either met us at the office or we picked him up. I don't know.

Q. What office?

A. A. M. A. office.

[fol. 51] Q. Where?

A. Fifth Street.

Q. What does A. M. A. mean?

A. Well, at that time, its not A. M. A., its the Bibb County Alcohol Control Unit, is what it is.

Q. After you got out there did you examine the house? Did you look around the house?

A. Yes sir.

Q. What did you find in the house?

A. I didn't see anything but the distillery and the usual stuff that you find around a distillery.

Q. Did you see any canned goods in there?

A. Seems to me there was some soda crackers on top of the still and a can or two of sardines.

Q. Some what on top of the still?

A. Box of soda crackers or something.

Q. And some sardines. Any other food in there?

A. I didn't see any. I don't recall seeing any food. I believe there was a can or two of potted meat or Vienna sausage there.

Q. Where was that?

A. As well as I remember it was setting right there at the still, either on top of the still or——

Q. In the front room?

A. Yes sir.

Q. What about in the other rooms, what was in them? [fol. 52] A. Well, part of the distillery, they had the jump nailed to the dining room floor and had torn the petition out. You could stand in the living room and see just over the entire house just about.

Q. See over the entire house?

A. Yes sir, just about it.

Q. Do you recall, are there two bedrooms on the other side of the house with a bathroom in between?

A. I don't know what they use the room for, there are some rooms.

Q. You recall there are two rooms on the right with a bathroom in between them?

A. I recall one room being there.

Q. On the front or back?

A. On the front.

Q. What was behind that room?

A. The bathroom was right there where you could see it because I remember they had torn the partition out of the bathroom and you could see all the way through there where they had the water running out to the still.

Q. Could you see the back room?

A. I believe you could see one corner of it.

Q. All right. Did you find anything else in that house that you haven't told us about?

A. We didn't find anything except er—just the dis-

[fol. 53] tilling equipment.

Q. Did you find any pillows?

A. No sir.

Q. Any bedding?

A. No sir.

Q. Any coats?

A. No sir.

Q. Did you look for them?

A. I looked. I didn't see any.

Q. I mean are you testifying that there wasn't anything in that house or that you just didn't see it.

A. To the best of my knowledge there was nothing in there but the distillery and the equipment used in operating the still.

Q. Do you recall a Yale lock being taken off of the front door?

A. Yes sir.

Q. Who did that?

A. I don't remember whether I did it or Investigator Williams. I think I did.

Q. Who is Williams?

A. Investigator Williams, W. W. Williams.

Q. What kind of investigator is he?

A. Alcohol and Tobacco Tax.

Q. He is a federal man?

A. Yes sir.

[fol. 54] Q. And neither—either you or him took that lock off of the front door?

A. It was Investigator Williams.

Q. Did you see him do t?

A. Yes sir.

Q. You saw him take the lock off of the front door?

A. Yes sir.

Q. Now, was there any sample saved by the federal agents?

A. Yes sir.

Q. What was it?

A. We just saved a mash sample to get the alcohol content of the beer and sent it to Atlanta.

Q. Who did that?

A. I think Investigator Williams did that.

Q. Investgator Williams saved a sample?

A. He or Higginbotham.

Q. Did he save anything else?

A. Just that and the lock.

Q. Did he look over the still, did you all look over the the still after he got there?

A. Yes sir.

Q. Examined it?

A. No sir.

Q. And did you look around the house for other evidence?

A. We just glanced around the house, yes sir.

[fol. 55] Q. To see what you needed and what you needed to pick up and save?

A. We don't save anything at a distillery.

Q. Well, I mean if you had found some identifying clothing or something like that you would have saved it?

A. Yes sir.

Q. And you looked for it, didn't you?

A. Yes sir, we looked around the house.

Q. You examined that house to pick out what evidence you wanted to get and save, for what evidence you could see; isn't that right?

A. Yes sir, I always look for all the evidence I can see in any house.

Q. In other words, you were evaluating what was there and picking out the things that you needed and either observing them or saving them so you could use them in prosecution in this court?

A. Well, I didn't see anything except just the distillery.

Q. But you looked for them, didn't you?

A. I looked around, yes sir.

Q. And if you had found something in there that would have helped you in this prosecution you would have saved it, wouldn't you?

A. Yes sir.

Q. That's what you are out there for, search that house [fol. 56] and seize anything that could help you, weren't you?

A. I just went out there to help the other officers and its our practice that—just because we adopt a case we don't stop there. We continue to investigate all these cases.

Q. Well, you all had adopted this case, hadn't you?

A. We had.

Q. Yes.

A. Yes sir.

Q. You all were in the case, you had adopted the case?

A We adopted the case from Jack Harbin.

Q. That's right. You had adopted the case and you went out there and gathered up your evidence for the prosecution here in this court?

A. We gathered up the evidence.

Q. And you searched that house?

A. We looked over the house, yes sir.

Q. And you seized what you wanted for prosecution in this court?

A. We got mash samples and the lock, that is all.

Q. And would have gotten anything else that you found there that you felt you needed.

A. If I had seen anything that I thought was of any value.

Q. Yeah, but I say you looked for it?

A. Yes sir, we looked.

Q. Now, did you have a warrant when you went in that house?

[fol. 57] A. No sir.

Q. Did Harbin have one?

A. No sir.

Q. Did Mr. Chance have a warrant?

A. No sir.

Q. Did any of the officers have a warrant?

A. Not that I know of.

Q. In other words, it is your understanding that there was no warrant?

A. That is my understanding.

Q. You were the head federal man, weren't you?

A. I wouldn't—Poe is in charge of the office. We have all——

Q. I mean of the people that were there you were the head man?

A. I don't know that I was.

Q. Well, if Mr. Brack Poe told me that you were, would you say that was right, that you were the head man at the time?

A. Yes sir, I guess so.

Q. Because I called for the head man in here.

A. Well, I just worked longer than any of the rest of them.

Q. Well, can you say definitely that there was no warrant?

A. No sir, there wasn't.

The Court: Isn't that admitted?

Mr. Ruford: Yes sir, I'll stipulate——

The Court: Let's go ahead with some other phase of it.

Q. Do you know who that house was under lease to at that time?

[fol. 58] A. Yes sir.

Q. Who.

A. Mr. Reagan of Murphey, Taylor and Ellis came up—we had Elmer Chapman in the office and he came in and said "This is the man that rented the house from me, but he told me his name was J. B. Lowe," and said "He is the man."

Q. In other words, he, in your presence, identified Elmer Chapman, the man who is charged in this court?

A. Yes sir.

Q. As the man that that house was under lease to at that particular time?

A. Said he rented it to him, yes sir.

Q. Now, what is the understanding that federal agents have with state officers with reference to adopting cases? What was the understanding at that particular time?

A. Well, there is no set understanding. Lots of time officers ask us to adopt cases that they think should be in federal court and there is no standing agreement or anything as to how they are handled. The officer that makes the case can do whatever he wants to with it.

Q. Do you know what instructions have been given to the state men about cases?

A. No sir.

Q. You don't know about that?

A. No sir.

Q. Don't you know that the head man, state man, has [fol. 59] told the agents if they find a still of any size, or

any great size or find any great big find of liquor that they are to turn it over to the federal authorities? Don't you know that that's the common practice?

A. No sir, its not common. Some officers do. I mean I think that they just let them decide among themselves who they want to turn over and who they don't. They talk it over with the officers.

Q. How big was this still?

A. 1300 gallons of mash.

Q. Have you all ever turned down a case with a still of that size that the state officers asked you to adopt?

A. Its not our job. The District Attorney, he——

Q. I'm just asking you if you know of a still this size——

Mr. Buford: If Your Honor, please, I would like for the record to reflect that the United States Attorney's Office is the one that decides what cases are going to be prosecuted in this district; the ones that are going to be presented to the grand jury and if there is any case that is brought in to our office that we don't think should be there we get it out right quick. I want the record to show that.

Mr. Elliott: That's not what I'm driving at, Your Honor. And as far as adopting a case, the United States Attorney, within my knowledge, has nothing to do with [fol. 60] whether a federal officer adopts a case or not. They do have something to do with what is presented to the grand jury, but as far as the federal officers adopting the case that is not within the purview of the United States Attorney, by custom.

The Court: All right. What is your question?

Q. My question is: Have you ever, within your knowledge, known of the federal government turning down a case that concerned a still of that size?

A. Offhand I don't recall which cases were turned down and which weren't. I know sometimes the District Attorney's Office turns a case down for adoption.

Q. But don't you know that as a common practice that the federal government accepts cases of a still this size?

A. Yes sir, they'll accept a good case of any size.

Q. And that is a common practice, the state agents call upon the federal government when they find a big still like this?

A. No, sir, the common practice is the state agents don't call the federal government. They call the sheriff because they had rather have it in the state court, as a common practice.

Q. You all didn't turn this case down, did you?

A. No sir.

Q. And if you got a call from a state agent right now with a big still you would accept it, wouldn't you?

[fol. 61] A. Yes sir, if the District Attorney would accept it it would suit me.

Q. Did you all call on the District Attorney before you accepted this case?

A. We talk it over with him on all of them.

Q. I say, did you talk with him about this case before you adopted it?

A. No sir.

Q. As a matter of fact, you don't as a common practice talk to him about cases before you adopt them, do you?

A. No sir, as a common practice we do talk to him before we adopt it.

Q. Before you adopt a state case?

A. Yes sir.

Q. How long has that been going on?

A. Ever since I can remember.

Mr. Buford: I would like to state, Your Honor, its been going on the eight years I've been up there. Everyone I've ever had I've tried to talk with them about it.

Q. In other words, if the state agent calls you up and wants you to come into an investigation you call the District Attorney before you go do it?

A. No sir, I usually go do it and then call him, if I think its necessary.

Q. Now, this mash and this lock, these things that you [fols. 62-63] saved, what did you do with them?

A. They are locked up in the evidence room. Well, the lock is, the mash is sent to Atlanta for the chemical analysis. They analyze that for the alcohol content.

Q. But you all brought those back with you and maintained possession of them and you still have possession within the government authorities?

A. Yes sir.

Q. Have those things that were saved?
A. Yes sir.

Cross-examination.

By Mr. Buford:

Q. Mr. Merrill, when you went out there to this house, along with the other federal officers, with Mr. Chance—when Mr. Chance called—did you answer the phone when Chance called or the other officers, or do you recall?

A. I don't recall. It seems to me that one of the other officers called me, that Chance had called them. I don't recall exactly who called me.

Q. Let me ask you this question. Up until the time that Chance called did you or the other federal officers, to your knowledge, have any information or knowledge that an investigation was being conducted out at this house that Bridgman owned?

A. No sir.

[fol. 64] Q. You didn't know anything about it, didn't know the state officers were out there until Chance had called you?

A. That's right.

Q. And then you went on out with Chance out to the house there and I believe you said that the defendant, Chapman, was sitting in the car out in the front with officer —State Officer Harbin?

A. Yes sir.

Q. And that you learned from State Officer Harbin after you arrived that Chapman had been placed under arrest?

A. Yes sir.

Q. And then I guess you discussed with Harbin about what had taken place in the house?

A. Yes sir.

Q. Then did you have occasion to go into the house?

A. Yes sir.

Q. Did you—how big a house roughly speaking, how many rooms, you have an idea, in it?

A. I would say five or six rooms and a bath.

Q. In those five or six rooms in this house, did you see anything in that house that would indicate that anybody was living there?

A. I didn't see anything that would indicate anybody was living there, no sir.

Q. Except a couple of cans of sardines and some Vienna [fol. 65] sausages and a liquor still and the barrels that were there in connection with the liquor still, did you see anything else in the house?

A. Well er—nothing—well they had shades on the windows, but that was all.

Q. The rooms were just vacant there except for these sausages and the liquor still?

A. Yes sir.

Q. And you said they had shades on the windows?

A. Yes sir.

Q. Were they pulled down or up?

A. Er——

Q. Or do you recall?

A. I don't recall when I got there whether they were up or down. I know some of them were still down.

Q. Before you went in that house out there after you arrived, could you smell the odor of whiskey?

A. Could smell the odor of mash, yes sir.

Q. That was before you went into the house?

A. Yes sir.

Q. Something was said about a lock that you or one of the other officers took off of the door there. What was the purpose in taking this lock off of the door?

A. We kept it for evidence. Mr. Harbin told us when he arrested Mr. Chapman he unlocked the door, had the key to the house, so we just took the key and the lock and [fol. 66] brought it in for evidence. And the owner of the house said the new tenant had changed the lock on the door, said it wasn't his lock he had on the door to begin with.

Q. Was Mr. Bridgman, the owner of the house, there when you took the lock off?

A. No sir.

Q. He wasn't there?

A. No sir.

Q. What about the key? It was your understanding that the key to this lock was in Chapman's possession?

A. Yes sir.

Q. And that he came there to open the lock up at the time that he was arrested?

A. Yes sir.

Q. And you don't know anything about this case before you got the call from Mr. Chance?

A. No sir.

Q. And as far as you know the other federal officers didn't either?

A. Yes sir.

Q. And Harbin is a state officer, I believe?

A. He was a Bibb County policeman at that time, state officer.

Q. Yes sir.

(Witness excused.)

[fol. 67] Mr. Elliott: May it please the Court, I have one other witness here. He is the man from Murphey, Taylor and Ellis. I asked the District Attorney once before if he would stipulate that Mr. Chapman was the lessee of that house. He didn't do it, but in view of the evidence by his agent I am wondering if he can do so at this time, and if so, I can dispense with putting him up.

Mr. Buford: I still state, Mr. Elliott, you make out your case because I don't know what the man will testify to.

RALPH E. REAGAN, being called by the Movant and having been duly sworn, testified as follows:

Direct examination.

By Mr. Elliott;

Q. Mr. Reagan, where do you work?

A. I work for Murphey, Taylor and Ellis.

Q. How long have you worked there?

A. Twenty years.

Q. You see that man sitting back there with the blue shirt on with his hand up on the back of the seat?

A. Yes sir.

Q. Do you know who he is?

A. Yes sir.

Q. Who is that?

A. I don't recall his name. I know him very well by sight.

[fol. 68] Q. Now, on or about February 16, 1958, were you handling for rental the Bridgman house located out on the Airport Cross Road?

A. Yes sir.

Q. Who was—on February 16, 1958, who was that house leased to? Can I ask you this. Was the house leased to that man with the blue shirt on here in the courtroom with his arm up on the back?

A. Yes sir, I leased it to him one time, seems like it was about a year ago, as well as I remember.

Q. Well, is he the man that you leased the house to?

A. Yes sir.

Q. And the house was under lease to him on February 16, 1958?

A. Yes sir.

Q. Now, in what name was it leased?

A. I don't recall. It was not the name that we found out later—it was not the name that he was——

Q. But that is the man back there?

A. That is the man, yes sir.

Q. That the property was leased to?

A. Yes sir.

Q. The man in the blue shirt?

A. Yes sir.

[fol. 69] Cross-examination.

By Mr. Buford:

Q. Mr. Reagan, I show you a statement here and ask you if that is your signature there?

A. Yes sir.

Q. I'll ask you if on January 28, 1958, a man came to your office and identified himself as being J. B. Lowe and wanted to rent a house on Herbert Smart Road? Is that correct?

A. Yes sir.

Q. This man paid you forty dollars rent on the house for the month of February, '58? Is that correct?

A. Yes sir.

Q. And this house was owned by Mr. R. H. Bridgman and Mrs. L. L. Herbert? Is that correct?

A. Yes sir.

Q. You were handling the rental for them?

A. Yes sir.

Q. And Mr. Bridgman and Mrs. Herbert are the owners of the house?

A. They were at the time.

Q. At that time?

A. Yes sir.

Q. And this is the same house in which the officers located the liquor still out there on February 16, 1958, according to your information?

A. Yes sir.

[fol. 70] Q. And that's the man back there that you just pointed out?

A. Yes sir.

Q. All right, that's all.

(Witness excused.)

Mr. Elliott: Has Mr. Harbin arrived?

Marshal: No sir.

The Court: We will suspend this hearing so he can get Mr. Harbin, and call the next one. (April 20, 1959.)

(April 21, 1959, 4:00 p.m.)

Mr. Elliott: Mr. Harbin is here now, Your Honor.

The Court: Very well.

Mr. Elliott: I would like to state into the record, Your Honor, that I have been denied the right by the District Attorney to talk to this witness and to go into the evidence before I am calling him as a witness.

Mr. Buford: I'll certainly agree that he requested Mr. Harbin to be interviewed by him yesterday, and I made the statement to Mr. Elliott that if I could interview his client, Mr. Chapman, I would be willing for him to interview the witness, but I wanted the witness to be brought in court in the usual way. I think I have a right to do that. We are a party to this proceeding like anybody else. I have [fol. 71] never heard of the government being required to turn their witnesses over to counsel on the other side to be examined outside of court.

Mr. Elliott: I pointed out to Mr. Buford, Your Honor,

at that time that Mr. Chapman was the defendant in the case whereas this is a witness in the case. All of the evidence with reference to my motion for supression of evidence is peculiarly within the knowledge of the officers who are witness for the government. I would have no way to prepare my case if I had no way to talk to them before putting them up on the stand. I felt and still feel that it is my privilege——

The Court: Is there anything you want me to rule on now, or are you just advising me, or what? The witness is here now.

Mr. Elliott: If Your Honor please, I don't know whether you would want to go into an ex parte proceeding such as ruling on this at this time or not.

The Court: Ruling on what?

Mr. Elliott: Ruling on whether or not under these circumstances counsel has the right to talk to and interview the federal agents prior to a formal hearing in the court.

The Court: Well, I don't like to reach out and rule on things that are not necessary for me to rule on. We have met now to try this case or hear this motion, have we [fol. 72] not, and he is here and do you have any objection to proceeding now and interviewing him in public and letting the court reporter take down your questions and his answers? I'll see that he answers your questions.

Mr. Elliott: No objection at all, Your Honor. I did think it worthwile to my client to state that in the record, which I did, sir.

The Court: Very well, let's proceed.

JACK R. HARBIN, being called by the Movant and having been duly sworn, testified as follows:

Direct examination.

By Mr. Elliott:

Q. Mr. Harbin, will you state your full name, please,
A. Jack R. Harbin.
Q. What is your profession?
A. Deputy sheriff of Bibb County.
Q. On September 16, 1958, what was your profession.

A. I was a county police at that time.

Q. County policeman for Bibb County, Georgia?

A. Yes sir, yes sir.

Q. Did you on that date, February 16, 1958, have an occasion to visit a house known as the Bridgman house on the Airport Cross Roads in Bibb County?

A. That's the Herbert Smart Road.

Q. Herbert Smart Road?

A. Yes sir. That is as I know it, Herbert Smart Road. [fol. 73] Q. All right. On Herbert Smart Road, if you prefer to call it that, do you know that that is sometimes referred to as the Airport Cross Roads?

A. No sir, I don't.

Q. You don't know that. All right. Will you tell us what happened on that date, please?

A. Well, on February 16, 1958, at about 5:00 p.m. Sunday afternoon S. V. Chance called me at my residence and met me at the station house and we went there to Mr. Bridgman's home and and he informed us that he smelled something strange around his home on Herbert Smart Road. So we went from his home to this residence on Herbert Smart Road and as we went up to the front door I could smell a strong odor of mash. I tried to see in the house and could not. The shades were on all the windows down, completely around the house. We went from the left side all around to the right side and I tried to get in several windows and could not. Mr. Bridgman gave me permission to go in his home.

And he stated to me that he was going to church that day, and as he was passing his house he saw these shades there and he thought someone had rented his home. So he was wanting them to er—go to church. He was going to invite them to go to church with him that evening, and went down there. He stated to me that he went down to the home and smelled the strong odor of mash and that's when he [fol. 74] called Mr. Chance. So we went around and I was checking all the windows trying to get in, and as I got around on the right hand side of the house facing the house I found the bathroom window unlocked and they boosted me up on their shoulders and I went in the house and found this still, 650 gallon still, and 2 fermenters containing 650 gallons of mash in the living room. I immediately told S. V. Chance to go and get us some help and they

left at approximately 5:20 p.m. that evening and I stayed there alone up until 6:00 o'clock when I heard an automobile drive up in the front driveway. I was sitting in the——

Q. Well now, just a minute. Let me interrupt you for a second. What time did you arrive there, at the house?

A. Well, I would say maybe five after five, ten after five, somewhere in that time.

Q. Between five minutes and ten minutes after 5:00 o'clock p.m.?

A. That's right.

Q. And what time did you enter the house?

A. It was, I imagine between 5:15 and 5:20, somewhere in that time.

Q. Now, what time did you instruct Mr. Chance to leave?

A. 5:20.

Q. About 5:20?

A. Yes sir.

Q. Immediately after you got in the house?

A. Yes sir.

[fol. 75], Q. Now, you told him to go get some help. What did you mean by that?

A. Well, Mr. Smith, my former state agent, was in charge of us. He always informed us to get help when we run up on a still in any place.

Q. What did he mean get help?

A. Well, we needed some help to watch the place.

Q. Help to do what?

A. Help to watch the still.

Q. Watch the place?

A. That's right.

Q. Now, by getting help, what did he mean?

A. Well, that could have meant to get other revenue agents to come out and——

Q. Other revenue agents?

A. Yes sir.

Q. Now, was—could that—did those instructions include getting federal revenue agents?

A. Yes sir, it could have.

Q. On locating a still such as this is it your common practice to bring in federal agents into the case?

A. Yes sir, it is.

Q. And that would be in conformance with your instructions from your supervisor?

A. That is correct.

Q. Did you expect Mr. Chance to call in the federal agents [fol. 76] on that date when he left?

A. Why, sir, I didn't know who he was going to call. I just told him to go get us some help.

Q. I said did you expect him to call in the federal agents?

A. Yes sir, I did expect him to.

Q. And as far as you know Mr. Chance left immediately at approximately 5:20?

A. Yes sir, so far as I know.

Q. All right. Now, what time did Mr. Chapman arrive at that house?

A. Mr. Chapman and an unknown white man entered the house at 6:00 o'clock sharp. I looked at my watch when they entered the door, 6:00 p.m.

Q. That was forty minutes after Mr. Chance had left?

A. Yes sir.

Q. What time did Mr. Chance get back with the officers?

A. I don't know, sir, it was, I would say maybe an hour later. I don't know the exact time. It was after dark when they arrived.

Q. All right, then what happened?

A. You mean when the federal investigators came?

Q. Yes.

A. When they came——

Q. Well to present it in chronological order let me ask, after Mr. Chapman arrived did you sit out in the car with [fol. 77] him until they came back, the other officers came back?

A. Well, er—I did sit there, but if you don't mind I would like to continue where I left off.

Q. All right.

A. After Mr. Chapman and an unknown white man entered the house—I was in the living room between the two fermenters of mash—they entered the door. Mr. Chapman entered first and they came in as far as the doublers, both men, and I jumped up and run over to them and told them they was under arrest. The unidentified man run to the door and opened it and fled out the front door and I grabbed Mr. Chapman and told him he was under

arrest. And the white man run up the front yard toward the Herbert Smart Road and I took Mr. Chapman and I asked him for the keys to the car. I placed him in the car and he gave me the keys to the automobile. And I turned the car around and went up towards Cochran Short Route looking for this unidentified man, and I could not find him. And so I went to look for a phone to call Mr. Poe, Brack Poe. And I went down to a filling station on Cochran Short Route and Emery Highway where I placed a call to Mr. Brack Poe and told him that I needed some help out here, that I had Elmer Chapman under arrest and he stated to me on the phone that the men were already on the way. And so he told me to go back to the house and wait on them. And I went back to the house on Herbert Smart [fol. 78] Road where I waited some twenty minutes when the officers arrived. I then turned Mr. Chapman over to Mr. Hugh Merrill.

Q. Is he a federal officer?

A. Federal officer.

Q. As soon as they arrived you turned him over to the federal officers?

A. That is correct.

Q. In other words, you looked for the man, you rode around, you called Mr. Brack Poe, and then you returned and sat out in the car with Mr. Chapman until the federal officers arrived?

A. Yes sir.

The Court: Did you take Mr. Chapman with you, or what happened to him?

A. I taken him with me, Your Honor.

The Court: Looking for the other fellow?

A. Yes sir.

The Court: You told him he was under arrest and he showed you you were mistaken about it?

A. Well, he told me——

The Court: The unidentified man?

A. Say that again, sir.

The Court: I say you told the unidentified man he was under arrest, but he showed you you were mistaken about that. He left you?

A. That's right, he left me. He sure did. And, Your [fol. 79] Honor, when I—er—after I er—took the defendant and we went up the road, why I came back to the home and the house was locked when I went out, so I took one of the keys on the ring and tried it in this Yale lock on this door and it fitted it and unlocked the door to the home in Mr. Chapman's presence.

Q. Now, when was that?

A. That was immediately after I came back to the home.

Q. Uh huh.

A. After I went out looking for this other unidentified man.

Q. Now, what did you say about the keys to the car?

A. I said I asked Mr. Chapman for the keys to the car and he took them out of his pocket and gave them to me.

Q. He gave you the keys to the car?

A. Yes sir, he did.

Q. The keys were not already in the car?

A. No sir, they were in his righthand pants pocket.

Q. Are you sure of that?

A. Yes sir, I'm sure of that.

Q. All right, now, after the federal agents arrived, what happened?

A. When they arrived I turned the defendant over to the federal agents, they placed him in the car and then they began to go in the house and to destroy the still.

Q. The federal agents?

A. Yes sir,——

Q. Now, did you see——

[fol. 80] A. —with my help.

Q. I beg your pardon?

A. And I also helped.

Q. You assisted the federal agents?

A. Yes sir.

Q. In going through the evidence in the house?

A. Yes sir.

Cross-examination.

By Mr. Buford:

Q. Where did you get the key to go in the door, Mr. Harbin?

A. The key was on the key ring with er—that I took from Mr. Chapman.

Q. That was on the key ring that came out of his right hand pocket?

A. That's correct.

Q. The key to the door?

A. Yes sir.

Q. I want to show you some pictures here and ask you if you have ever seen them before. I don't know whether you have or not. One of the federal officers—

Mr. Elliott: May I see those, Your Honor?

The Court: Yes sir. Shall we look at them together and save time.

Mr. Buford: I just don't know whether this man has ever—he might be able to testify about them, but I do know [fol. 81] some officer does. I just want to know if he has seen them before. If he has never seen them I won't question him about them.

The Court: I imagine he has seen them, if I was just going to guess at it. Have you, Mr. Witness, or not?

A. Yes sir, I have, Your Honor.

Q. Well, are you in position then to describe those pictures there, what they are?

A. Yes sir.

Q. Now, there are several here outside of the house. What is this picture here, number 4 in this package—I believe its number 4. Is that made on the inside of the house?

A. Yes sir, that is made in the living room. That's the two vats of mash there.

The Court: May we agree that they'll be called 1, 2, 3, and 4, and so market by the Clerk?

Mr. Buford: Yes sir, I appreciate that.

Q. You say that's mash there on picture number 4?

A. Yes sir.

Q. In there, what do you call that?

A. A fermenter, metal fermenter.

Q. Now, you said you were—that's liquid there in that fermenter?

A. Yes sir.

Q. Now, you said before you went into the house and [fol. 82] after Mr. Bridgman requested you all to come over there and investigate this thing that you smelled the odor of mash before you went into the house?

A. I smelled it from the front of the home, yes sir.

Q. Now, picture number 5 in this pamphlet, what is it?

A. That's a still there, Your Honor, I mean—er Mr. Buford, and this right here is the doubler.

Q. Now is that the same snapshot—is that just about—is that the doubler?

A. No sir, this is the still here.

The Court: That's the next number?

Mr. Buford: Yes sir, next number.

Q. Now, let me get them straight here. Picture number 7, what is that? Is that a table or something there?

A. No sir, this is the still and this is the doubler, and this is the er—flake stand with the radiator or condenser.

Q. Yes sir. Does that appear to you to be Vienna sausages and some soda crackers and stuff there on the still?

A. Yes sir, it appears to be that, with an automobile hubcap laying there.

Q. Yes sir. The next picture, what does that appear to be?

A. Well, that's the still here with Investigator Merrill with a half gallon jar of mash.

Q. Yes sir. And what is this next picture, this big barrel?

A. That's a doubler and the er—the doubler there and [fol. 83] the flake stand.

Q. Yes sir. Now, did you see any beds, any pillows or anything out there in that house?

A. No sir, I didn't see any living quarters at all in the home.

Q. Did you see anything other than the still and its accessories and these sardines and Vienna sausage that you just described?

A. No sir, I saw some fruit jars and things.

Q. Did you—I believe you said something about them having blinds on the windows.

A. They had some shades.

Q. Shades?

A. Yes sir.

Q. Were those shades drawn as you approached the house in the first instance?

A. Yes sir, they were pulled to the bottom of the windows.

Q. Did you have any difficulty in smelling this mash as you approached the house or was it a weak, light smell or could you smell it——

A. It was a strong odor.

Q. What did you recognize that to be as you approached the house with Mr. Bridgman?

A. I recognized it as mash.

Q. What kind of mash, laying mash?

A. No sir, mash that you make illegal whiskey out of.

Q. How long have you been an officer?

A. Since November, 1955.

[fol. 84] Q. And you had Mr. Chapman under arrest and you had already been in the house and made your search in there before the federal officers arrived at the scene. Is that correct?

A. That's correct, sir.

Q. All right, sir.

Re-direct examination.

By Mr. Elliott:

Q. Mr. Harbin, did you have a search warrant when you entered this house?

A. No sir; I did not.

Q. And how many people were there with you when you first arrived? I believe you testified Mr. Bridgman and Agent Chance?

A. That's correct.

Q. Would it have been possible for you to have left a guard over that house until you got a search warrant before entering?

A. I don't believe so.

Q. Why?

A. Because it was only two officers there, Chance and myself.

Q. You had Chance there, you had yourself there and you had Mr. Bridgman there?

A. That's right.

Q. And there was a house over next door close by, wasn't there?

A. That's right.

Q. Did that house have a telephone in it, do you know?

A. Well, at that time I didn't know.

[fol. 85] Q. Well, does it have one in it? Do you know now?

A. Yes sir.

Q. Could it have been possible for you to, one of you to have gone over and used that telephone and while you guarded the house?

A. It could have been possible.

Q. You didn't do that, did you?

A. No sir.

Q. You just went on in that house without a search warrant, didn't you?

A. I went in with the owner's permission.

Q. Yeah, but what did that owner tell you about that house insofar as it being rented?

A. He said he thought it was rented. He turned it over to a real estate company, I believe, and that's what he hold me and I don't know, sir.

Q. Hadn't he been getting the rents on that house?

A. He said it had been vacant for sometime and he didn't know if it was rented. He thought it was rented.

Q. But the reason he went down there was to get those folks to come to church, wasn't it?

A. That's correct.

Q. So he thought it was rented, didn't he?

A. Yes sir.

Q. He understood that that house was rented?

[fol. 86] A. Well, he just thought it.

Q. Well, that's what he told you, wasn't it?

A. Yes sir.

Q. And you had already sent for the federal officers before Mr. Chapman arrived, hadn't you?

A. I didn't specify any certain officers. I just said "help."

Q. But you understood and you expected him to call the federal officers, didn't you?

The Court: I think he has already gone over that, hasn't he?

A. Yes sir.

Q. And that was before Mr. Chapman arrived?

A. When I asked Mr. Chance to get help, it was before Mr. Chapman arrived.

Q. And then when you went to the telephone Mr. Poe had already been notified, had he not?

A. I couldn't say that, sir. I don't know.

Q. Well, that's what he told you, wasn't it?

A. He told me that the help had already left.

Q. And Mr. Poe is a federal agent, isn't he?

A. Yes sir.

Q. Now, I want to refer to these pictures which I presume will be marked Govt. Ex. No. 1, the holder and the pictures will be numbered consecutively, 1 through 9. I refer to the first picture, who is in that picture and specify [fol. 87] whether they are federal or state officers.

A. That is Investigator Williams and myself and one man there I can't identify, only his arm and part of his leg are shown.

Q. Is Williams a federal agent?

A. He is a federal investigator with the Alcohol and Tobacco Tax——

Q. And was at that time?

A. Yes sir.

Q. And there is food there in the house, is there not? What does that food consist of?

A. I don't know, sir. I don't remember.

Q. Well, look at it and see what you can tell from the picture. Is there a bottle of milk up there?

A. No sir, that's a bottle of mash.

Q. What else is that, can you tell?

A. I can't identify that.

Q. Who filled that bottle full of mash?

A. I couldn't say, sir. One of the investigators.

Q. One of the federal men?

A. Yes sir.

Q. One of the federal men collected that mash?

A. That's correct.

Q. Now, who is this on picture number 2, coming out of the front door?

A. That is myself.

[fol. 88] Q. Now, in picture 4, who is that?

A. That's Investigator Higginbotham and Investigator Williams.

Q. Are they federal or state men?

A. They are federal investigators.

Q. And were at that time.

A. Yes sir.

Q. Now, do you distinguish any food in that picture?

A. No sir, I can see something there but I can't identify it.

Q. What about that?

A. No sir, looks like it might be sardines.

Q. Does that look like a loaf of bread to you?

A. I can't identify it in the picture.

Q. All right now, we'll turn to picture number 5. Who is that in that picture?

A. That's Investigator Merrill and I can't identify the other man.

Q. Who is Investigator Merrill, federal or state man?

A. Federal.

Q. Was he a federal man at that time?

A. Yes sir.

Q. Now, what about the food in that picture?

A. I see a bottle of mash and I can't make out what the other is.

Q. Is that a box of saltines there, a saltine box?

A. Could have been.

Q. Does it look like a salfine box to you? Turn it upside [fol. 89] down and read what is on the box?

A. I—how am I going to turn that box upside down?

Q. Turn the picture. What does that say?

A. I can't make it out.

Q. Does that say "Premium"?

A. I can't make it out.

Q. Can you read?

A. Can you read it?

Q. Yeah, I can read it. It says "Premium", very clear. Now, we turn to picture 6, who is in that picture?

A. That's Investigators Higginbotham and Hugh Merrill, both federal investigators.

Q. What about in that picture, can you make out any of that food?

A. That's the same box, but I—all I can tell is it-er looks

Q. It that a saltine box there? Look at it—saltine crackers?

A. That's what it says.

Q. That's what it says on the box; is that right?

A. I can't make out exactly what it is.

Q. Well, can you see some saltines in a little celophane bag there sitting beside that box?

A. Looks very much like a package of saltines.

Q. All right now, in picture 8, I ask you can you see any food in that picture?

A. Looks like some sardines there, the box has "Prem-[fol.-90] ium" written on it.

Q. You were out there that day, weren't you?

A. Yes sir.

Q. And you didn't even look enough to know what food was ther

A. I was n't interested in the food.

Q. You weren't interested in the articles there in the house?

A. Yes sir, I was interested in the articles but er—

Q. Well, who are the men in this picture, number 8 here?

A. That's Federal Investigator Merrill and myself.

Q. Is this Federal Investigator Merrill right here that I'm pointing to?

A. Yes sir.

Q. What is he doing in that picture?

A. He is punching a hole in the top of this fruit jar lid to keep it from exploding.

Q. What is in that fruit jar?

A. Its mash out of this fermenter.

Q. Is that what Mr. Merrill collected out there?

A. Yes sir, he has to have that.

Q. I see. Now, I want to ask you just a couple of more questions. Going back to when Mr. Chapman—you testified Mr. Chapman and another man entered the house. Tell me whether or not both of them came all the way in the house?

A. Yes sir, they did.

Q. Did the door close behind them?

A. I er—couldn't really say that it was closed or not.

[fol. 91] Q. Did you see who opened that door?

A. I could see Mr. Chapman enter first, yes sir. I couldn't tell——

Q. I said did you see who unlocked the door?

A. No sir, I did not.

Q. So you don't know who unlocked that door, do you?

A. No sir.

Q. You were inside and couldn't see them come up to the house, you just heard the noise outside?

A. That's correct.

Q. And er—why did you arrest Mr. Chapman?

A. He came in where there was an illegal still.

Q. Was it based upon the evidence that you found in that house?

A. That's right.

Q. Did you enter that house to arrest somebody or did you enter that house for the purpose of gathering evidence to arrest somebody?

A. Well, I entered that house to arrest someone when they did come from the evidence that was in the living room.

Q. Well, at that particular time you knew nobody was in that house, didn't you?

A. There was no-one in the house when I entered it.

Q. So when you entered it it was not for the purpose of arresting anybody, was it? It was for the purpose of getting evidence to arrest somebody, wasn't it?

[fol. 92] A. I have to have the evidence before I can arrest anyone.

Q. Just answer my question. Is that—am I correctly stating it?

A. I——

Q. You entered that house for the purpose of gathering evidence for the purpose of a future arrest rather than an immediate arrest at that time?

A. That's right.

Q. And you arrested Mr. Chapman based upon what you had found in that house——

A. That's right.

Q. —when he arrived there.

(Witness excused.)

Mr. Elliott: I have no further evidence, Your Honor.

The Court: You rest?

Mr. Elliott: Yes sir.

Mr. Buford: Your Honor, I know of nothing else. I have conferred with the other officers on this case. I know of nothing else that the government can offer other than what has been brought out. I submit what I consider to be a detailed brief on the questions involved in here, so I don't have anything else to add on it. I certainly take the position that for the numerous, many reasons I state in my brief that the motion should be denied.

[fol. 93] Mr. Buford: I would like to know if this would be of any aid to Your Honor to put these pictures in that we talked about. The Clerk has them.

The Court: Well, you may offer them if you like and see if there are any objections.

Mr. Elliott: I have no objections, Your Honor.

The Court: They are *admitted*, G-1 thru G-9, and Mr. Elliott, you offered two the other day, did you not?

Mr. Elliott: Yes sir, I have two which I understand have already been entered into the evidence.

The Court: If not, is there any objection to them, Mr. Buford?

Mr. Buford: No sir.

The Court: Mr. Elliott, do you think you are in a position to urge the illegality of the search in view of your pleadings and the evidence in the case?

Mr. Elliott: Yes sir.

The Court: Well, apparently you rely upon the bare fact that your client was a lessee of the premises?

Mr. Elliott: Yes sir.

The Court: You don't claim to be in custody or control of them, do you?

Mr. Elliott: Through his having leased them, of course, would give him the right to the premises, the right to the custody and control of the premises.

[fol. 94] The Court: Well now, your original motion says "This defendant does specifically disclaim that said dwelling was his own or that it was under his custody and control at the time of the search, but does admit that he leased said premises for a friend and not for his own

use and does rely upon this motion in view of the obvious contention of the United States of America to the contrary." That still stands doesn't it?

Mr. Elliott: No sir.

The Court: Well, has that been retracted anywhere?

Mr. Elliott: There is a motion to amend which is dated the 20th of this month which eliminates in its entirety that second sentence.

The Court: Oh, I see.

Mr. Elliott: And I might comment that the words "of a private dwelling" are eliminated from the original motion also by that amendment. I am standing on the fact that this man leased a house which is described in the pictures that I have introduced into evidence and which evidence shows was a residential type house, not a place of business, such as a barn or shed or something of that sort, but a residential type house in a residential district with other houses around it which were occupied, and that was the lessee of that house.

The Court: Well, I'm going to overrule the motion to suppress. I do not think that this house rented and used [fol. 95] as it was is entitled to the protection which the Constitution and the laws throw around private dwellings. That being true, I think that a manufacturing establishment of this kind can be searched on a Sunday afternoon upon probable cause, and I think that the probable cause existed in this case, particularly in view of what owner Bridgman had seen and smelled and had related to the officers, and on what the officers smelled and saw and heard from Mr. Bridgman when they approached the premises in view of the fact that owner Bridgman told the officers that he had reason to believe that there was a still in his house and not only consented but asked the officers to go in and see about it, although it was in the absence of the bare lessee who, on his pleadings in this court, does not claim that he was in possession of the house but is a bare lessee. I think that this search could not be branded as unreasonable under the Constitution. And, therefore, that's my ruling and you may take an order accordingly, Mr. District Attorney.

Mr. Elliott: I take it, Your Honor, that the Court is not going to allow me the privilege of making oral argument at this time.

The Court: Well, you didn't request it and you have filed a written brief and I read your written brief, but answering your question further, did you want to make an oral argument?

[fol. 96] Mr. Elliott: I had anticipated doing so, Your Honor. I stated my evidence was closed and you from the bench state that——

The Court: Well, I think I'll let the ruling stand on the basis of your written brief, which I have studied carefully.

[fol. 97] [File endorsement omitted]

IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

[Title omitted]

ORDER OVERRULING MOTION TO SUPPRESS—April 22, 1959

The motion to suppress evidence having come on for a hearing and after the Court has considered the evidence and the briefs submitted by counsel, it is

Considered, Ordered and Adjudged that the motion should be denied and the same is denied.

This the 22 day of April, 1959.

W. A. Bootle, United States Judge.

[fols. 98-99] IN UNITED STATES DISTRICT COURT

Transcript of Testimony on Merits

JACK ROBERT HARBIN, being called by the Government and having been duly sworn, testified as follows:

Direct examination.

By Mr. Buford:

* * * * * * *

[fol. 100] Q. Well, let me ask you this. Did your investigation disclose that this was—this home was owned by Mr. Bridgaman?

A. Yes sir.

Q. Now, did Mr.—did you go with Mr. Bridgaman out to this house?

A. Yes sir.

Q. And after going to the house did you have occasion to go into the house?

A. Yes sir, I did.

Q. Was Mr. Bridgaman there when you went into the house?

A. Yes sir, he was.

Q. I'll ask you to state whether or not if he requested you to go into this house, Mr. Bridgaman?

A. He did, yes sir.

Q. Now, before going into the house, Mr. Harbin, I'll ask you what did you observe there at the house as to whether anybody was living there or not?

A. Well, I went on around the house and I couldn't observe anyone living there except for shades being pulled to the bottom of the windows. That's all I could observe [fol. 101] except for a strong odor of mash.

Q. Strong odor of what kind of mash?

A. That's mash that you make illegal whisky with.

Q. Now—well, tell us what took place then after you—after Mr. Bridgman instructed you to go in there?

A. Well, he instructed me to go in the house so I began trying the windows from the left side and went completely around his house until I reached the bathroom window on the right hand side of the home where it was unlocked and they boosted me up on their shoulders and I went in

the house and found an illegal still, 650 gallon still with 2 fermenters containing 650 gallons of mash in the living room of the home.

Q. How was it hooked up with reference to water? How did they get water?

A. Well, they had the water hooked up from the kitchen sink, I believe.

Q. Now, did you see any signs posted out there in that house on this distillery "Registered Distillery", or anything like that?

A. No sir, I didn't.

Q. Is that what we commonly refer to as being a moonshine liquor distillery?

A. Yes sir.

Q. In the house did you see anything in there that would appear to you that anybody was living there, residing there? [fols. 102-107] A. I couldn't find any evidence of anyone living there.

Q. Was there any furniture in there?

A. No sir.

. . . . . .

[fol. 108] Cross-examination.

By Mr. Elliott:

Q. Mr. Harbin, I would like for you to look at Ex. D-1 and also I hand you Ex. D-2 at the same time and ask you, are those photographs of the house concerning which you have been testifying?

A. Yes sir.

Q. Now, where is that house located?

A. On Herbert Smart Road.

Q. Is that out in a residential area?

A. Well, it's across from the airport. There are a few homes along that road.

Q. There are homes along that road?

A. Yes sir.

Q. There are no businesses along that road, are there?

A. No sir.

Q. They are homes?

A. Its Herbert Smart Air Base right across the road there.

Q. Well, I asked you was this home in a residential area?
A. Yes sir.
[fol. 109] Q. Was there a house next door to this house?
A. That's correct.
Q. When you got there was this still running, was it fired up?
A. No sir, it was not.
Q. How do you know who owned that house, Mr. Harbin?
A. Well, all I know is Mr. Bridgaman told me he owned it.
Q. What he told you?
A. That is all I know.
Q. So any testimony with reference to Mr. Bridgman's ownership is hearsay to you? Is that correct? It's hearsay. You don't know who owns that house, do you?
A. Well, he told me he owned it. That's all I know.
Q. That is what I say. Any information concerning his ownership is what he told you?
A. That's correct.
Q. So therefore within your own knowledge you don't know who owned that house, do you?
A. I don't know, no sir.
Q. Now, when you first got to that house, if I understand your testimony, there were shades on all windows?
A. That's correct.
Q. And all those shades were down?
A. That's correct.
Q. And that you and your friends walked all the way around this house and tried all of the windows and looked [fol. 110] in all of the windows? Is that right?
A. That's correct.
Q. Now, what did you see inside that house at that time?
A. I couldn't see a thing from the outside of the home.
Q. Those shades wouldn't let you see a thing in that house, would they?
A. That's right.
Q. Could you tell whether anybody was living in that house or not at that time?
A. No sir.
Q. You didn't know whether anybody was living in there or not, did you?
A. No, I didn't.
Q. Somebody could have been in there in the bed asleep

in the privacy of their home when you entered through that window and you wouldn't have known it, would you?

A. Well, when I raised the window I could tell it was vacant.

Q. In other words, you raised that window for the purpose of entering, didn't you?

A. That's correct.

Q. And at that time you didn't know whether anybody lived there or not, did you?

A. That's right.

Q. Did you have a search warrant on your person?

A. No sir.

[fol. 111] Q. You know the law requires a search warrant to enter a private home?

A. Yes sir.

Q. You know that don't you?

A. Yes sir.

Q. You knew you were doing the wrong thing by going in this house, didn't you?

Mr. Buford: Now, if Your Honor please, we object to that question and the answer because the ruling has already been made in this case that there was no unlawful search and seizure.

Mr. Elliott: I'll withdraw the question.

The Court: Well, the question is withdrawn by counsel

Q. Do you know what Mr. Chapman is charged with here today?

A. Yes sir.

Q. Now, what did you do after you got in that house? Did you take possession, did you seize that property in there?

A. I didn't seize it, no sir.

Q. What did you do?

A. I just went in each room and seen what was in there and I called Mr. Chance and told him that there was a still in this house, to go and get some help.

Q. You didn't seize the property at that time? Is that correct?

A. No sir, I didn't seize any property.

Q. How about the automobile? Did you seize the auto-

[fol. 112] mobile after Chapman got there?

A. After he got there, yes.

Q. How did you go about constituting your seizure of the automobile?

A. Well er—I just took charge of it when he came in.

Q. Well, would you say you had taken charge of the house in there, the still in the house?

A. Well, I took charge of it because it had a still in the home, yes sir.

Q. Well, I'll ask you this. If anybody tried to run off with it you would have stopped them, wouldn't you?

A. I would have tried to stop them.

Q. Yes sir. In other words, that still was in your possession and under your custody at that time, wasn't it?

A. Yes sir.

Q. And that was before Mr. Chapman even got there, wasn't it?

A. That's right.

Q. So if he is charged with possessing and having that still in his custody that couldn't be right, could it, because you had that still in your custody, didn't you?

A. I was just watching it.

Q. Well, you just told me you had it in your custody, didn't you?

A. Well, I was there watching the place.

Q. Didn't you just tell me, Mr. Harbin, you had that still in your custody?

[fol. 113] A. Well, it was—I guess I did.

Q. You understood my question, didn't you?

A. I believe I did.

Q. And you say this still wasn't operating at that time?

A. No sir.

Q. Was anybody working at that still when you got there?

A. No sir.

Q. Did you see Mr. Chapman working at that still?

A. No sir, I did not.

Q. Do you know whose still that was of your own knowledge?

A. I don't really know whose it was, I just know who came—

Q. All right, do you know who put it there?

A. I don't know who put it there.

Q. Do you know who had been operating it?

A. No sir.

Q. Had you ever been out there to this house before——
A. No sir.
Q. —you came out on this day?
A. Never had——
Q. Had you ever seen Mr. Chapman out there before?
A. Not at that residence, no sir.
Q. That's what I say. Had Mr. Chapman been connected with that house in any way within your knowledge before that day?
A. No sir.
Q. Now, you say that Mr. Chapman got out of the car and [fol. 114-121] entered the house with another man. Is that what you said?
A. Yes sir.
Q. Well now, where were you at that time?
A. I was sitting in the living room.
Q. With the shades still down?
A. Shades were still down.
Q. Could you see out?
A. I couldn't see out.
Q. How do you know Mr. Chapman got out of that car?
A. I assumed he got out of it.
Q. Well, we don't want you to assume up here, Mr. Harbin, we want to know what you saw and what you know.
A. Yes sir.
Q. We don't want any assumption.
A. That's right.
Q. So your statement that he got out of the car and entered the house was an assumption. You don't know whether he got out of that car or not, do you?
A. No sir.

* * * * * * *

[fol. 122] (Witness excused.)

HUGH G. MERRILL, being called by the Government and having been duly sworn, testified as follows:

Direct examination.

By Mr. Buford:

Q. Give us your full name, please sir.

A. Hugh G. Merrill.

Q. What type of work are you engaged in?

[fol. 123] A. I'm an investigator with the Alcohol and Tobacco Tax.

Q. You are a federal agent?

A. Yes sir.

Q. Mr. Merrill, back in February—let's see—February 16, 1958, did you have occasion to go out to a house on the Herbert Smart Road here in Bibb County, Georgia, in connection with the case we are now trying?

A. Yes sir.

Q. Tell us, Mr. Merrill, just what took place, what you saw and what you know about this case.

A. Well, I received a call that the officers wanted some help, and we met and went out on Herbert Smart Road. We understood that they needed some help there at a still. When we arrived at this house we saw a Mercury automobile parked in the front yard and Elmer Chapman and Officer Jack Harbin were setting in the car.

Q. Sitting in the Mercury?

A. Yes sir. So, I asked Jack what happened and he said that he had been in the house and that Elmer Chapman and this unidentified man had walked in.

Mr. Elliott: If Your Honor please, I object to what that man told him.

The Court: Yes, don't go into any statement by your fellow officer in the absence of the defendant.

A. He had arrested Elmer Chapman and they was sitting [fol. 124] in the car, and we went into the house and looked over the house and found an illicit distillery in the house. This distillery was set up—it wasn't in operation, but it was set up and had approximately 1300 gallons of mash in the vats. We looked all over the house and there was nothing there to indicate that anybody was living there.

And then we went back out and I examined this car, this Mercury.

Q. What model Mercury was that? Do you recall?

A. 1952 I believe, or '53. I don't remember.

Q. But that was the Mercury car that Mr. Harbin and Chapman were sitting in when you got there?

A. Yes sir. I examined this car and in the floor board in the back and also in the trunk we found particles of sugar and wheat bran and several burlap bags. In that car also there was two pair of glasses, the glass rims with the glasses out.

Q. Glass rims, but the glass was out.

A. Yes sir. And at that time I didn't notice the hub cap missing off of the car, but I went in the house and there was Mercury hub cap laying on top of the still. And then I noticed that a hub cap was missing off of the car, and er——

Q. Wait just a minute. You say you found a hub cap on the inside of the house?

A. Yes sir.

Q. What type of car did this hub cap fit?

[fol. 125] A. The Mercury hub cap.

Q. Was the Mercury automobile that you saw sitting in the yard with the bran and sugar and stuff in it—er did it have all it's hub caps on it?

A. No sir.

Q. How many were missing?

A. I know one was missing, there may have been another one. I just noticed that er——

Q. What room of the house did you find the hub cap in? Do you recall?

A. Best of my recollection it was laying in the room on top of the still when I saw it.

Q. Now, these glasses that you have described, the ones that didn't have any glass in them, but just had the rims on them?

A. Yes sir.

Q. You say there were two pairs of them?

A. Yes sir.

Q. Where were they located in the automobile? Do you recall?

A. Yes sir, they were laying in the er—it was either in

the front seat or up on the dashboard. I don't remember which, but there were two pairs laying there.

Q. Now, the sugar and the bran, the evidence of that that you have told us about, what part of the Mercury automobile was it located in?

[fols. 126-139] A. Both in the floorboard and the trunk, and there also was a little sack of flour there.

. . . . . .

[fol. 140] Q. Now, the first time you talked with Mr. Chapman was that out at the scene?

[fol. 141-147] A. Yes sir.

Q. And that was when you advised him that his statement could be used against him in court?

A. Yes sir.

Q. You advised him of his Constitutional rights?

A. Yes sir.

Q. And then in reply thereto he told you that he went there to go to a bathroom?

A. Yes sir.

Q. Now, what did he say about the other man?

A. He said he knew who he was but he would rather not say.

Q. All right, when was the next time that you advised him of his rights?

A. The next morning, February 17th, yes sir.

Q. What did you advise him then, and then I'll let Mr. Elliott examine?

A. I advised him of the same thing, that it was his right not to make any statement, and that if he did it could be used against him.

. . . . . .

[fol. 148] Q. What was it you advised him on this occasion?

A. I advised him of the same thing, that he didn't have to make a statement, that it was his Constitutional right that he didn't have to make a statement, that any statement he made could be used against him in a criminal prosecution.

Q. All right, sir. Did Mr. Chapman make any statement to you on this occasion, Mr. Merrill, about this still?

A. Yes sir, he made er——

[fol. 149-161] Q. Speak up, please sir.

A. He made conflicting statements. He said that he went there to see about renting the house, the first time. And then he changed it er—after he was—well, I better not say that, but he changed it and then he said he went there to see about buying some whiskey.

Q. Said he did what?

A. Went there to see about buying some whiskey.

Q. That was up here in the office on the day after you went out to the still?

A. Yes sir.

. . . . . .

[fol. 162] Roy Earl Bridgaman, being called by the Government and having been duly sworn, testified as follows:

Direct examination.

By Mr. Buford:

. . . . . .

[fol. 163] Q. All right, sir. Just tell the Court and jury what you remember about the transaction, what you know about it?

A. Well, I'll start at the beginning to the ending; is that all right?

Q. Yes sir, because I haven't talked with you and I just want you to tell what you know about it.

A. Well, in February, 1958, we had a visitation for the church, so we went to the church first and grouped off by pairs. So the pastor wanted me to go and visit some new neighbors that had moved into the neighborhood. I said "Well, there is some new people moved in my house and I'm going to go down there and visit them." And he said "Well, I wish you would go down here and visit these others." I said "Well, let me go down here and visit these first and——"

Q. Now, Mr. Bridgaman, these gentlemen back here are having a little trouble hearing you and, of course, Mr. Elliott has got to hear you also. Speak as loud as you can, please sir.

A. All right. Well, I went—we went and I told him I was going down here and visit these folks down here on Herbert Smart Road where my house was, and I said if we have enough time left we'll go down here and visit these in Wheeler Heights. So, we went down there to my house to visit these people and they had shades up to the win-[fol. 164] dows and all of the shades was down, but we knocked at the door. Nobody come to the door, so I smelled an awful scent around there and I just knowed what it was by smelling of it. I smelled it before I got to the house, and I walked around the house. It has a basement in the bottom and not closed in, just an open basement. I looked in there and wasn't nothing in there, and so we went on back and made this other visit. And I went to the house and I picked up the telephone and I called the officers and told them what I thought was there. And they said "Well, if you stay there at the house we'll be there in fifteen minutes." So I stayed at the house and in about twenty minutes, I reckon, they was out there, two of them. So I carried them down to the house and they asked me, said "Will you give me permission to go in there?" I said "If it's what I think it is, what it smells like, yes, you can have my permission to go in." So they went in there, opened the door and I walked in the living room and there it was, all piled up in the living room. That was the only thing in the world in the house, was that whiskey still and the mash, beer.

Q. That is what you know about it, Mr. Bridgaman?

A. And that is all I know. They brought me back home, and left one of them there, and he said he was going to town and get some more help to do something or another. I don't know what they were going to do. That's the last I know about it.

[fol. 165] Q. What real estate agency was handling the rental of your house there for you?

A. It was Reagan's.

Q. All right, sir. That's all.

Cross-examination.

By Mr. Elliott:

Q. Mr. Bridgaman, I have one or two questions I would like to ask you. Who owned the house at this time? This was on February 16, 1958?

A. Me and Mrs. Herbert owned it together.

Q. Mrs. Herbert?

A. We been owning it for about six years.

Q. What interest did you own in the house?

A. Well, I had er—her husband and my—and me was sole owners in it and so he passed away and he willed her his part, see?

Q. You had a half interest?

A. Yeah.

Q. And he had half interest?

A. I kept up all the work around it and, you know, looked after it because she wasn't able to look after it.

Q. And when he died he left the half that he owned to you?

A. No, he left it to his wife, see, and then I bought the other half from her.

[fol. 166] Q. But at this particular time it was owned by you and Mr. Herbert?

A. Well, on er——

Q. Now, this was on February 16, 1958.

A. February—I don't know whether I bought it before from—Mrs. Herbert's part before then or after then, somewhere in that neighborhood. And I bought the other half of it, see?

Q. So in other words, at this particular time your testimony is that you either owned a half or all of the house? You don't know which.

A. Yeah, I know I owned half, but I don't know for sure what date I bought the other part.

Q. Now, had you listed this house with Murphey, Taylor and Ellis?

A. Yeah. Mr. Herbert had before he died, see?

Q. All right now, on February 18th was this house rented out—February 16th, was it rented out through Murphey, Taylor and Ellis?

A. It must have been because they was in it.

Q. And you were getting the rent check, getting paid?

A. We got er—one rent check. I think it was $20,. I think, something like that.

Q. In other words, at that time you were getting the rent check from Murphey, Taylor and Ellis?

A. Yeah, I think so.

[fol. 167] Q. And had they notified you that the house was rented?

A. No, they didn't notify me.

Q. They would have notified Mr. Herbert, wouldn't they, because he listed it?

A. Yeah, they would notify Mrs. Herbert.

Q. But the house was rented out at that time, was it not?

A. Yeah.

Q. And you knew that?

A. Yes sir, yeah.

Q. And from the outside of that house could you tell whether anybody was living in there or not?

A. No, I couldn't tell whether there was any furniture in it at all.

Q. You couldn't see in it at all?

A. No, couldn't see in it.

Q. And didn't know whether anybody was in it, or not.

A. I didn't know whether anybody was in it, but I——

Mr. Elliott: No further questions, Your Honor.

(Witness excused.)

Ralph Emmett Reagan, being called by the Government and having been duly sworn, testified as follows:

Direct examination.

By Mr. Buford:

Q. Give us your name, please sir.

A. Ralph Emmett Reagan.

[fol. 168] Q. Where are you employed, Mr. Reagan?

A. Murphey, Taylor and Ellis.

Q. Are you all in the rental business? Some of these jurors here are not from Macon.

A. Rentals, yes sir, real estate.

Q. Back in January of 1958 I'll ask you if you had the occasion to handle an transaction, or rental of a house, for a Mr. Bridgaman and Mrs. Herbert or Mr. Herbert out on the Herbert Smart Road?

A. Yes sir, I did.

Q. Tell us, Mr. Reagan, just what you recall about the transaction, the rental of it.

A. A man came into the office, whom I had met previously, and asked me about the house. I don't recall, I may have had a sign on it or he may have known about it in some other way, and inquired if it was for rent and said he wanted to rent it. And I fixed him up, agreed to rent it to him, and fixed him up a standard thirty day rental contract for the rent and er——

Q. Do you see the man in the courtroom, Mr. Reagan, that rented the house from you that you are telling us about?

A. Yes sir.

Q. Where is he?

A. He is sitting here. (Pointing to defendant.)

Q. Sitting here?

A. Yes sir.

[fols. 169-189] Q. Is this the gentleman that rented it from you?

A. Yes sir.

Q. What was the rental agreement per month—I mean, how much was it?

A. Forty dollars.

Q. Forty dollars a month?

A. Yes.

Q. What name did he use in renting this house from you, Mr. Reagan?

A. Lowe, I think the initials were J. B. Lowe, L-o-w-e.

Q. J. B. Lowe?

A. Yes sir.

. . . . . .

[fol. 190] UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

No. 7542

UNITED STATES OF AMERICA,

v.

ELMER SAMUEL CHAPMAN

JUDGMENT AND COMMITMENT—May 1, 1959

On this 1st day of May, 1959 came the attorney for the government and the defendant appeared in person and [1] By Counsel, (employed) It is adjudged that the defendant has been convicted upon his plea of [2] Not Guilty and a verdict of guilty of the offense of 26 USCA 5174, 5601, 5606, Possession and custody of an illicit liquor distillery; carried on the business of a distiller of spirituous liquors without having given bond; and carried on the business of a distiller of spirituous liquors with intent to defraud the U.S. of the tax imposed thereon, as charged [3] in Counts 1, 2, and 3. and the court having asked the defendant whether he has anything to say why judgment shoul not be pronounced, and no sufficient cause to the contrary being shown or appearing to the Court,

It is Adjudged that the defendant is guilty as charged and convicted.

It is Adjudged that the defendant is hereby committed to the custody of the Attorney General or his authorized

---

[1] Insert "by counsel" or "without counsel; the court advised the defendant of his right to counsel and asked him whether he desired to have counsel appointed by the court, and the defendant thereupon stated that he waived the right to the assistance of counsel."

[2] Insert (1) "guilty," (2) "not guilty, and a verdict of guilty," (3) "not guilty, and a finding of guilty," or (4) "nolo contendere," as the case may be.

[3] Insert "in count(s) number " if required.

representative for imprisonment for a period of [4] One Year and One Day, or until he is otherwise discharged as provided by law, on Count 1.

It is Adjudged that [5] the defendant is hereby placed on probation for a period of Five (5) Years from this date, on each Counts 2 and 3; service of said sentence to run concurrently with prison sentence on Count 1.

It is ordered that the Clerk deliver a certified copy of this judgment and commitment to the United States Marshal or other qualfied officer and that the copy serve as the commitment of the defendant.

(s) W. A. Bootle, United States District Judge.

At Macon, Georgia

The Court recommends commitment to: [6]

——— ———, Clerk.

[fol. 191] IN THE DISTRICT COURT OF THE UNITED STATES FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

[Title omitted]

JUDGMENT OF ACQUITTAL AS TO COUNT 4—April 22, 1959

The above stated case having been tried on the 22nd day of April, 1959, and the jury having returned a verdict of not guilty, as to Count 4,

---

[4] Enter (1) sentence or sentences, specifying counts if any; (2) whether sentences are to run concurrently or consecutively and, if consecutively, when each term is to begin with reference to termination of preceding term or to any other outstanding or unserved sentence; (3) whether defendant is to be futher imprisoned until payment of the fine or fine and costs, or until he is otherwise discharged as provided by law.

[5] Enter any order with respect to suspension and probation.

[6] For use of Court wishing to recommend a particular institution.

It is Hereby Considered, Ordered and Adjudged that the defendant is not guilty and that he be forthwith discharged, and that the Clerk of this Court enter this Judgment of Acquittal accordingly.

This the 22 day of April, 1959.

/s/ W. A. Bootle, United States Judge.

At Macon, Georgia.

Filed Apr. 22, 1959.

[fol. 192-198] IN THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF GEORGIA, MACON DIVISION

[Title omitted]

NOTICE OF APPEAL—May 1, 1959

Notice is hereby given that Elmer Samuel Chapman, Macon, Georgia, does hereby appeal to the United States Court of Appeals for the Fifth Circuit from judgment entered on May 1, 1959, committng named Appellant to the custody of the Attorney General for a period of one year and a day on count one and probation for a period of five years on counts two and three, sentences to run concurrently, count one charging violation of 26 USCA Sec. 5174, 5601 and counts two and three charging violations of 26 USCA 5606.

This 1st day of May, 1959.

/s/ J. Sewell Elliott, Attorney for Appellant.

Of Counsel: J. Sewell Elliott, Suite 506 Persons Building, Macon, Georgia.

Filed May 1, 1959

[fol. 199] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17811

ELMER SAMUEL CHAPMAN

versus

UNITED STATES OF AMERICA

ARGUMENT AND SUBMISSION—October 19, 1959

On this day this cause was called and, after argument by J. Sewell Elliott, Esq., for Appellant, and John C. Bracy, Esq., Assistant United States Attorney, for Appellee, was submitted to the Court.

[fol. 200] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17811

ELMER SAMUEL CHAPMAN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Middle District of Georgia

OPINION—December 1, 1959

Before Rives, Chief Judge, and Tuttle and Jones, Circuit Judges

Tuttle, Circuit Judge: This appeal from a conviction on a four count illegal liquor indictment presents principally the question whether the trial court erred in not suppressing evidence and testimony of the prosecuting witnesses resulting from a search without a warrant.

[fol. 201] The search, which appellant contends was illegally conducted, was made by local state officers in Bibb County, Georgia. The circumstances under which the search was made are somewhat different from the usual

case of this kind. One Bridgeman was the owner of the house in question. Georgia State Revenue Officer Chance received a call from Bridgeman who told the officer that he owned this house and that he thought it had been rented and he had gone by to invite the people to church on this Sunday afternoon; that upon approaching the property he smelled mash which he identified as coming from within the house. Whereupon he told Chance that if he would come out to the premises he would show him a still. Chance called other officers; they joined Bridgeman and went with him to the premises. There they found all the shades of the house drawn and the doors locked. The officers also testified to the strong smell of mash emanating from the house. *At Bridgeman's request* they entered the house through an open window and found it unoccupied except for the presence of a complete illegal distillery. There was also a partially run quantity of mash. There was no evidence of occupancy as a residence, although several cans of sardiness and boxes of soda crackers were found in the vicinity of the distilling apparatus. The officers then called the local office of the Federal Alcohol Tax Unit and asked them to come to the scene to assist in dealing with the matter.

While the State officers were waiting, the appellant, accompanied by an unidentified person, drove up and [fol. 202] entered the front door. He was there arrested and placed in his automobile where he remained until the Federal officials arrived on the scene. He was identified as the person who had leased the house from Bridgeman through a real estate agent. His keys, which he turned over to the State officers after being arrested, included a key to the front door of the leased premises.

Upon the arrival of the Federal officers they went into the house and destroyed the still and contents, after keeping such material evidence as they deemed necessary for a subsequent prosecution.

Appellant contends that the Federal officers, at the time they first entered the premises, did so without a wararnt, which of course is not disputed, and that they thus participated in the illegal search, the fruits of which were made the basis of the subsequent prosecution. The Government, on the other hand, contends that the State officers had completed the search at least to the extent that

when the Federal officers arrived they then had probable cause for a Federal arrest of Chapman, and a search of the premises, by reason of what the State officers then presented to them. Appellee says that the State's search itself was not illegal, but if it was, the search by the Federal officers was not infected with this illegality. *Shurman* v. *United States*, 5 Cir., 219 F. 2d 282, cert. den. 349 U.S. 921. See *Lustig* v. *United States*, 338 U.S. 74.

The trial court, without distinguishing between the actions of the State and Federal officers, held that under [fol. 203] the peculiar circumstances here present, this was not an illegal search.[1]

The circumstances which the court considered especially significant were that the owner of the premises himself identified to his own satisfaction a smell of mash emanating from his property previously thought to have been rented to a tenant for residential purposes; that he himself requested the officer to investigate; the fact that it was on a Sunday afternoon and that the prop-

---

[1] The short and direct comment by the trial court follows:

"The Court: Well, I'm going to overrule the motion to suppress. I do not think that this house rented and used as it was is entitled to the protection which the constitution and the laws throw around private dwellings. That being true, I think that a manufacturing establishment of this kind can be searched on a Sunday afternoon upon probable cause, and I think that the probable cause existed in this case, particularly in view of what owner Bridgman had seen and smelled and had related to the officers, and on what the officers smelled and saw and heard from Mr. Bridgman when they approached the premises in view of the fact that owner Bridgman told the officers that he had reason to believe that there was a still in his house and not only consented but asked the officers to go in and see about it, although it was in the absence of the bare lessee who, on his pleadings in this court, does not claim that he was in possession of the house but is a bare lessee. I think that this search could not be branded as unreasonable under the Constitution. And, therefore, that's my ruling and you may take an order accordingly, Mr. District Attorney."

erty was not used as a residence but as a "manufacturing establishment."

We agree with the conclusion and reasoning of the trial court. We do not come to the question whether, if the actions of the State officers were illegal, this would be a case in which the search by the Federal officers would be insulated from attack under the "silver platter doc- [fol. 204] trine." See *Rios* v. *United States*, 9 Cir., 256 F. 2d 173. We recognize that the question whether such doctrine, most recently restated in the Lustig case, *supra*, will ultimately prevail in light of the attacks currently being made upon it could not be resolved by us so as to conflict with the previous decisions of this Court and of the Supreme Court even if we were inclined to do so (which we do not decide). We note, however, that there is now pending in the United States Supreme Court the case of *Elkins* v. *United States*, . . . U.S. . . ., 28 L.W. 3097. This case, decided by the Court of Appeals for the Ninth Circuit, held, as we have heretofore decided, that the illegality of a state search would not of itself warrant the suppression of evidence in a Federal prosecution. The Court there said:

> ". . . the unlawfulness of the State's search and seizure, if indeed they were unlawful, did not entitle defendants to an order of the district court suppressing the property seized."

Even if this Court were free to anticipate a reversal of this decision on the pending appeal by the Supreme Court, we need not decide this question. Instead, we concur in the judgment of the trial court that under the circumstances of the search here made by the State officers, no illegality was shown.

We have considered the other question raised by the appeal but find no merit in the contention that the court erred in submitting the case to the jury on the testimony properly before it.

The judgment is Affirmed.

[fols. 205-206] IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 17811

ELMER SAMUEL CHAPMAN,

versus

UNITED STATES OF AMERICA

JUDGMENT—December 1, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle District of Georgia, and was argued by counsel;

On Consideration Whereof, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

[fol. 207] UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT

[Title omitted]

PETITION FOR REHEARING—Filed December 21, 1959

Comes now Elmer Samuel Chapman, Appellant in the above entitled cause, in which judgment was entered by this Court on December 1, 1959, under the provisions of Rule 29 of the Rules of this Court, and the Trial Court having entered on May 25, 1959, order permitting Appellant to prosecute his appeal herein to conclusion without prepayment of fees or cost or giving security therefor, and any costs of printing and preparation of transcripts required to be borne by the United States, files this, his Petition for Rehearing, and for grounds hereof respectfully submits:

1. The Court failed to recognize in its opinion that Appellant contends that the seizure of the evidence in question, as well as the search for same, was illegal.

2. The Court did not give sufficient weight to the following uncontradicted facts as is indicated by its failure to

bring out these facts in its opinion: that the house searched was ostensibly a residence, being strictly a residential type house located in a residential area; that Bridgeman, the owner, believed the house to be occupied as a residence by a lessee until after the entry into the house; and that Ap- [fol. 208] pellant was at the time the lessee of the house.

3. The Court is most respectfully requested to reconsider its conclusion from the evidence that "*At Bridgeman's Request* (Italics) they entered the house . . ." (O.2). Bridgeman testified (R. 164) that he gave his permission conditioned upon "If it's what I think it is, what it smells like" and only then after the officers asked him for his permission.

4. The Court failed to bring out in the opinion and give proper weight to the fact that the search made by the State officers was not incident to an arrest (since no offender was in the house) and "had no immediate connection with an arrest" but "The purpose was to secure evidence to support some future arrest." Also that no offense was being committed in the presence of the officers. See U. S. v. Rabinowitz, 339 U. S. 56 at page 65, Taylor v. U. S., 286 U. S. 1.

5. The Court failed to properly apply the decisions of the Supreme Court of the United States in Trupiano v. U. S., 334 U. S. 699, and U. S. v. Rabinowitz, supra, at page 66, the latter overruling the former in part only "*To the extent*" that the Trupiano decision "requires a search warrant solely upon the basis of the practicability of procuring it rather than upon the reasonableness of the search *after a lawful arrest.*" (Emphasis provided)

6. The Court failed to give proper weight to the facts that the search by the State officers was general and exploratory for whatever might be turned up and specificity was not the mark of the search and seizure. U. S. v. Rabinowitz, supra.

7. It is respectfully submitted that the Court gave undeserved weight to the following findings which it considered *especially significient* in its decision:

(a) The owner identified a smell of mash coming from the house (Probable cause for belief that certain articles subject to seizure are in a dwelling cannot of itself justify

a search without a warrant, therefore such significance is [fol. 209] not in accord with the ruling of Jones v. U. S. (1958), 357 US 498).

(b) The owner requested the officers to investigate. (See paragraph 3 above. Also the right to give permission for entry was not in the owner and lessor. Such permission when given is not such as to deprive lessee of his standing under his Constitutional guarantees. Therefore such significance is not in accord with the ruling of Trupiano v. U. S., supra).

(c) The search and seizure occurred on a Sunday afternoon. (According to the ruling of Trupiano v. U. S., supra, and other decisions this fact is not deserving of such significance.)

(d) The house was not being used as a residence but as a manufacturing establishment. (Such significance is not in accord with the ruling in Lustig v. U. S., 338 U. S. 74, at page 80, since the officers and the owner did not know this fact before entering and one may not justify a search by what he finds during his illegal searching. As stated by this Court in Clay v. U. S., 5 Cir., 239 F2d 196, at page 201: "To allow justification to rest on discovery after intrusion would permit 'the Government * * * to justify the arrest by the search and at the same time to justify the search by the arrest.' "

8. It is respectfully submitted that the search by the State officers without a warrant cannot be determined to be legal under the law as it stands, there being absent from the present facts even the slightest circumstance to show a situation of emergency, one compelling immediate action because of likely loss of evidence or any necessity for entry prior to obtaining a warrant. Walker v. U. S., 5 Cir., 225 F2d 447, Clay v. U. S., 5 Cir., 239 F2d 196.

9. Lastly it is respectfully submitted that in its finding that the search by the state officers was not illegal, this Court has overlooked its previous rulings and wisdom in [fol. 210] numerous instances requiring a search warrant to be obtained in the absence of an arrest or circumstances which compel immediate action.

Wherefore, upon the foregoing grounds, and for other reasons appearing in Petitioner's brief, it is respectfully

urged that a rehearing be granted in this matter and that the mandate of this Court be stayed pending the disposition of this petition.

This the 19th day of December, 1959.

J. Sewell Elliott, Attorney for Petitioner.

[fol. 211] IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 17811

ELMER SAMUEL CHAPMAN, Appellant,

versus

UNITED STATES OF AMERICA, Appellee

Appeal from the United States District Court for the Middle District of Georgia

OPINION IN DENIAL OF REHEARING—January 7, 1960

Before Rives, Chief Judge, and Tuttle and Jones, Circuit Judges

Per Curiam: The motion for rehearing is Denied. The motion contains the following ground:

> "3. The Court is most respectfully requested to reconsider its conclusion from the evidence that 'At [fol. 212] *Bridgeman's Request* (Italics) they entered the house . . .' (O.2). Bridgeman testified (R. 164) that he gave his permission conditioned upon 'if it's what I think it is, what it smells like' and only then after the officers asked him for his permission."

In view of the emphasis which we placed on the fact that the entry was at Bridgeman's request, we think it appropriate to answer this ground of the motion by point-

ing out that the testimony of the State Officer contained the following passage:

> "Q. And did the owner, Mr. Bridgeman, tell you to go in there and see about it and see what was in his house?
>
> A. That's right."

Based on this evidence the trial court found that Bridgeman "not only consented but asked the officers to go in and see about it." We think that our conclusion that the officers entered the house "at Bridgeman's request" is a proper conclusion on this state of the record.

[fol. 213] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS AND PETITION FOR CERTIORARI

On petition for writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

On consideration of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted. The case is transferred to the appellate docket as No. 1035.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

June 27, 1960.

☆ U. S. GOVERNMENT PRINTING OFFICE 1960 896670 378

FILE COPY

PETITION NOT PRINTED

SUPREME COURT, U.S.
FILED
NOV
JAMES R. BROWNING, Clerk

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 175

ELMER SAMUEL CHAPMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

J. SEWELL ELLIOTT
Suite 300 Persons Building
Macon, Georgia

JOSEPH H. DAVIS
Suite 300 Persons Building
Macon, Georgia

Counsel for Petitioner

TABLE OF CONTENTS

SUBJECT INDEX

	Page
BRIEF FOR PETITIONER:	
Opinion Below	1
Jurisdiction	1
Statutes and Federal Rules Involved	2
Question Presented	2
Statement of the Case	3
Argument	7
Conclusion	12
Certificate of Service	13
Appendix	15
Constitutional Provisions	15
Statutes	15
Federal Rules of Criminal Procedure	17

CITATIONS

CASES:

Agnello v. *United States*, 269 U. S. 20, 46 S.Ct. 4	10
Byars v. *United States*, 273 U. S. 28, 47 S.Ct. 248	10
Elkins v. *United States*, —— U. S. ——, 4 L. ed. 2d 1669, 80 S.Ct. 1437	7, 10
Lustig v. *United States*, 338 U. S. 74, 69 S.Ct. 1372	10
Joines v. *United States*, 357 U. S. 573, 78 S.Ct. 1380	10
Jones v. *United States*, 357 U. S. 493, 78 S.Ct. 1253	9, 10

Page

Jones v. *United States*, 362 U. S. 257, 4 L. ed. 697, 80 S.Ct. 725 7
Taylor v. *United States*, 286 U. S. 1, 52 S.Ct. 466 10
Trupiano v. *United States*, 334 U. S. 699, 68 S.Ct. 1229 ..... 8, 9
United States v. *Jeffers*, 342 U. S. 48, 72 S.Ct. 93 ..... 8, 9, 11
United States v. *Rabinowitz*, 339 U. S. 56, 70 S.Ct. 430 9

CONSTITUTIONAL PROVISIONS:

Amendment IV to the Constitution of United States 2, 7, 8, 11, 12, 15

STATUTES AND RULES:

Section 5174, Internal Revenue Code of 1954 ..... 2, 15
Section 5601, Internal Revenue Code of 1954 ..... 2, 15
Section 5606, Internal Revenue Code of 1954 ..... 2, 16
Rule 41(e), Federal Rules of Criminal Procedure 2, 17

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 175

ELMER SAMUEL CHAPMAN,

Petitioner,

vs.

UNITED STATES OF AMERICA.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR PETITIONER

Opinion Below

The opinion of the Court of Appeals for the Fifth Circuit (R. 79) is reported at 272 F2d 70.

Jurisdiction

The judgment of the Court of Appeals was entered on the 1st day of December, 1959 (R. 83). A petition for rehearing was denied on January 7, 1960 (R. 86). The petition for a writ of certiorari was filed on February 6, 1960 and was granted on June 27, 1960 (R. 87).

The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

Constitutional Provisions, Statutes and Federal Rules Involved

The Fourth Amendment to the Constitution of the United States, Sections 5174, 5601 and 5606, Internal Revenue Code of 1954, Rule 41(e), Federal Rules of Criminal Procedure, which are set forth in the Appendix.

Question Presented

1. Was petitioner's immunity from unreasonable searches and seizures as guaranteed under the Fourth Amendment of the Constitution of the United States violated when a Georgia state law enforcement officer, without a warrant of any kind, on a Sunday afternoon, opened a closed bathroom window of a residential type house in a residential area, entered said house by climbing through said window and found evidence therein which was used in the federal prosecution of petitioner, the circumstances being as follows:

a. Petitioner was the exclusive lessee of the premises and had not given his consent for said entry, search or seizure.

b. The entry was not made for the purpose of making an arrest but for the purpose of securing evidence to support a future arrest.

c. The *one and only* circumstance known to said officer before his entry which might have suggested a violation of any law within or in the vicinity of said house was the apparent odor of fermenting mash detectable only when in close proximity to said house.

d. At the time of said entry there was no threat of removal or destruction of said house or any property

therein and no threat of flight of anyone therefrom. The three persons present at the time of the entry could have adequately secured the premises while obtaining a search warrant.

e. The owner of a one-half interest in said house had given his permission for the entry but only after advising the officers that the house was rented out for residence purposes and that he believed the house was at the time being occupied as a residence; the entering officer at the time of his entry having no knowledge or information to the contrary.

f. The participating state officers immediately after the entry contacted federal officers according to their official instructions and standing procedure and took no further action pending the federal officers' arrival. Thereafter petitioner was arrested when he entered the house and the arresting officer immediately telephoned the federal officers and when told they were on their way awaited their arrival with petitioner outside the house. Upon the arrival of the federal officers the search of the house and seizure of the evidence was completed under the direction of the federal officers to pursue federal prosecution.

Statement of the Case

Petitioner was indicted in the District Court of the United States for the Middle District of Georgia, in a four count indictment charging violations of the Internal Revenue Laws relating to liquor, in substance as follows (R. 1, 2):

Count One—Possessing and having under his control a distilling apparatus.

Count Two—Carrying on the business of a distiller without giving bond.

Count Three—Carrying on the business of a distiller with intent to defraud the United States of taxes.

Count Four—Working in a distillery.

Petitioner timely filed his Motion to Suppress Evidence (R. 3, 4) obtained in a search of and seizure from the house in question, alleging that said evidence was "obtained by an unlawful search and seizure without warrant. This defendant does show that said unlawful search and seizure was effectuated on February 16, 1958, upon premises known as the Bridgman house, Airport Cross Road, Macon, Georgia. Petitioner does show that at the time of said search he was the lessee of the premises."

Said Motion to Suppress Evidence was heard by the District Court, evidence was presented (R. 5-61) and said motion was denied (R. 61). Petitioner was then brought to trial in said District Court (R. 62-75), the evidence sought to be suppressed was admitted into the evidence during the trial and at the close of the evidence of the prosecution, the Court directed and the jury returned a verdict of not guilty as to Count Four, (working at a distillery) (R. 77). At the close of all the evidence, petitioner renewed his Motion to Suppress Evidence and further moved the Court to rule out of the evidence said evidence sought to be suppressed. Both said motions were overruled in their entirety and petitioner was thereafter convicted and sentenced on Count One, to serve one year and one day in the custody of the Attorney General and on each of Counts Two and Three the imposition of sentence was suspended and petitioner placed on probation for a period of five years (R. 76).

On an Appeal in Forma Pauperis to the United States Court of Appeals for the Fifth Circuit, petitioner's conviction was affirmed on December 1, 1959 (R. 83) and his

petition for rehearing was denied on January 7, 1960 (R. 86, 87).

Order granting leave to proceed in forma pauperis and writ of certiorari to the United States Court of Appeals for the Fifth Circuit was entered on June 27, 1960 (R. 87).

The facts material to the consideration of the questions presented are as follows:

On Sunday, February 16, 1958, one Mr. Bridgman, the owner of a one-half interest in subject house, a residential type house in a residential area (R. 24, 25, 26, 60, 63, 64), went to said house to invite the occupants and lessees of said house to come to church. The owners of said house had some months previously rented said house through a rental agent to a person or persons unknown to them and had been collecting the rent through the agent. Bridgman believed the house to be occupied as a residence at the time. Upon walking up to the house Bridgman smelled an odor of mash emanating from the house and noted that there were shades pulled down over all the windows so that he could not see into the house. Bridgman then returned to his home and called Georgia State revenue agent Chance and reported what he had smelled and observed at the house (R. 71-75).

Chance then in the company of Bibb County policeman Harbin picked up Bridgman at his home and the three drove to the house, smelled the odor of mash emanating from the house and walked around the house and tried to look into the windows but couldn't see in because of the shades (R. 8-10, 46, 64). After Bridgman sanctioned the officers' entry into the house (R. 13, 46), Harbin fully aware of the house being leased for residential purposes (R. 54), knowing that Bridgman believed it to be occupied as a residence and not having any reason to believe that the house was not being occupied as a residence (R. 13,

54, 64, 65), then tried several windows finding all of them locked until he tried a bathroom window which was unlocked (R. 46). Without a warrant of any kind (R. 53) Harbin then raised this bathroom window, pushed back the shade and entered the house through that window (R. 46). The entry was made for the purpose of obtaining evidence to support the arrest of some then unknown person and not incident to an arrest (R. 58).

Immediately upon getting inside and observing a still therein, Harbin called to Chance to go get help and sat down and waited (R. 46, 47, 65). Harbin did not open a door and Chance and Bridgman did not then enter or look into the house (R. 11, 12). Harbin meant for Chance to get the federal revenue officers, Chance understood him to mean to get the federal revenue officers and Chance went immediately and called the federal officers (R. 12, 47, 48).

While the federal officers were on the way to the house, petitioner drove up to and entered said house and was placed under arrest by Harbin (R. 12, 47-49, 72). Harbin and petitioner then got in the car parked in front of the house and went immediately and called the federal officers and when told that they were on the way returned to the house and waited outside in the car until the arrival of the federal officers (R. 49). When the federal officers arrived, petitioner was turned over to them. the federal officers then searched the house, sifted, appropriated and seized evidence from the house and destroyed the still (R. 22, 23, 24, 50, 55).

The state officers understood that it was common practice at the time for state revenue men to call in federal authorities on still cases and they frequently followed this practice. The "bossman" of the state officers had instructed them to call in the federal authorities on cases of this type and he called the federal men in compliance with these instructions (R. 13, 14, 47, 48).

Each of the state officers at the time of the initial entry by Harbin was armed with a pistol and could have placed a guard on the house until obtaining a warrant before entering (R. 15, 54). There was no compelling or immediate need, such as threatening destruction or probability of change in the situation when the house was entered (R. 14, 15, 64). The only suggestion of a violation of any law at the time of entry was the smell of mash when in close proximity to the house (R. 46, 67).

Petitioner was at the time the lessee of the house (R. 4, 73-75).

ARGUMENT

Since the decision of the Court of Appeals below, this Court has held that evidence obtained by State officers during a search which, if conducted by federal officers, would have violated a defendant's immunity from unreasonable searches and seizures under the Fourth Amendment is inadmissible over a defendant's timely objection in a federal criminal trial. *Elkins* v. *United States*, —— U. S. ——, 4 L. ed. 2d 1669, 80 S.Ct. 1437. Consequently, whatever questions concerning the so called silver platter doctrine and admissibility of evidence illegally acquired by state officers that might have heretofore existed in this case have been decided in favor of petitioner.

Also since the decision of the Court of Appeals below, this Court has held that because an accused's presence in an apartment searched was legal he had standing to raise the question of the legality of a search of that apartment. *Jones* v. *United States*, 362 U. S. 257, 4 L. ed. 697, 80 S.Ct. 725. The distinctions and refinements that formerly existed between invitees or guests and lessees or licensees were abolished in that decision so as to give to invitees

or guests clearly a standing upon which to challenge a search and seizure. While neither the district judge nor the Court of Appeals unequivocally held that petitioner, as lessee, had no such standing, the trial court did hint that such was the case and the Court of Appeals failed to properly recognize the rights, privileges and immunities due petitioner through such standing. In this connection, see *Trupiano* v. *United States*, 334 U. S. 699, 68 S.Ct. 1229; *United States* v. *Jeffers*, 342 U. S. 48, 72 S.Ct. 93, in which decisions it was held that the interest of a lessee furnishes the requisite quantum of interest to challenge an illegal search. The conclusion is inescapable that petitioner, as lessee of the premises searched, has a standing to challenge the search and seizure herein complained of.

The only issue now left for consideration is whether or not the search and seizure was illegal.

Neither the decision below of the Court of Appeals nor of the District Court can be squared with the provisions of the Fourth Amendment and the applicable decisions of this Court interpreting and applying the provisions of said amendment.

The decision of the Court below erroneously held that the search and seizure in question was legal under the existing facts and circumstances. Those facts and circumstances show that the *one and only* circumstance known to the officers before the entry which suggested a violation of any law within or in the vicinity of said house was the apparent odor of fermenting mash detectable only when in close proximity to said house. The entry was not for the purpose of an arrest nor the search and seizure incident to an arrest. There were no compelling circumstances to require entry without a warrant. The owner of a one-half interest in said house had consented to the

entry at a time long after exclusive rights of possession had been given to Lessee.

At the time of the search without warrant there was no violence within the house; no movable vehicle involved; no arrest; no imminent destruction, removal or concealment of the property seized; and the officers could have easily prevented any such destruction or removal by guarding the house until a warrant was obtained. There was ample opportunity to procure a warrant. A house with a telephone was next door and two armed officers and a civilian were there at the time. *Jones* v. *United States*, 357 U. S. 493, 78 S.Ct. 1253; *United States* v. *Jeffers*, 342 U. S. 48, 72 S.Ct. 93; *United States* v. *Rabinowitz*, 339 U. S. 56, 70 S.Ct. 430.

Search warrants are required except incident to a valid arrest or in exceptional circumstances. The burden is on those seeking the exemption to show the need for a search without a warrant. *United States* v. *Jeffers*, *supra*.

At the time the house was rented out for residential purposes and the part owner consenting to the entry believed that it was being occupied as a residence, all of which the officers knew and the entering officer had no information, knowledge, or reason to believe that the house was not at the time being occupied as a residence. Vindicated anticipation of what an illegal search may reveal does not validate a search otherwise illegal. Officers cannot justify a search by what they find in searching. *Trupiano* v. *United States*, 334 U. S. 699, 68 S.Ct. 1229;

This Court has established on numerous occasions as settled doctrine that probable cause for belief that certain articles subject to seizure are in a dwelling house cannot of itself justify a search without a warrant. The facts here show nothing more prior to the entry than the detection of an odor apparently that of fermenting mash. Such

searches are unlawful notwithstanding facts unquestionably showing probable cause. *Agnello* v. *United States*, 269 U. S. 20, 46 S.Ct. 4, 70 L.Ed. 145; *Taylor* v. *United States*, 286 U. S. 1, 52 S.Ct. 466, 76 L.Ed. 951; *Jones* v. *United States*, 357 U. S. 573, 78 S.Ct. 1380, 2 L.Ed. 547; *Jones* v. *United States*, 357 U. S. 493, *supra*.

It is inconceivable that the search and seizure herein can be justified in view of this Court's holding in *Jones* v. *United States*, 357 U. S. 493, *supra*. There the officers had received reports that a still was located in the defendant's house, they saw spent mash coming from a hose that led close to the house, they smelled the distinctive odor of hot mash from the direction of the house and heard coming from within the house the sounds of voices and a blower burner commonly used to heat distilleries.

Notwithstanding the decision in *Elkins* v. *United States*, petitioner emphasized that State officers may not offer into evidence in Federal Court any evidence illegally seized when there is a working agreement or understanding with Federal officers. *Byars* v. *United States*, 273 U. S. 28. It is immaterial whether Federal officers originated the idea or joined in it while the search was in progress so long as they joined before the object of the search was completely accomplished. To assist in the analysis and selection of evidence is participating although Federal agents knew what they were likely to find before joining the search. Such shows that the "silver platter" doctrine is not applicable. Search is a functional, not merely a physical, process and is not completed until effective appropriation, as part of an uninterrupted transaction, of illicitly obtained objects for subsequent proof of an offense. To differentiate between participation from the beginning and joining before the search runs its course would draw too fine a line. *Lustig* v. *United States*, 338 U. S. 74. Search

and seizure are not easily isolatable but are bound together by one sole purpose and are incapable of being untied. *United States* v. *Jeffers*, *supra*.

Any attempt to justify this search on the basis of the lessor's consent to the entry fails under even the most cursory analysis. The consent of the lessor affords the officers no legitimate basis for such entry as they made. To say that one who has some peculiar right, ownership or interest in a premises, e.g. lessor, one holding title for security purposes, innkeeper, etc., can legitimately authorize a search therein for contraband or evidence to be used against another who has an equally peculiar right or interest therein and possession thereof, e.g. a tenant, borrower, hotel guest, etc. is to say that the Constitutional immunities afforded the latter are subject to the actions of the former. Such guarantees under the Constitution cannot be so lightly disposed of by one who—at most—would have only some possible statutory or common law right to enter premises in order to prevent waste. The evidence below firmly established that the premises searched was under lease to and in the possession of petitioner.

Any statutory or common law right that is concerned solely with the civil remedies of a landlord as to the protection of his *property* in no manner whatsoever could be used by law enforcement authorities to circumvent the provisions of the Fourth Amendment to the Constitution of the United States.

The owner of contraband possesses no property rights therein; by the same token the lessee of premises used in violation of the law may forfeit what *property rights* he has therein. However, in neither case does he lose the privileges and immunities guaranteed to him by the Fourth Amendment as against unreasonable searches and seizure.

If the contrary were true lessees could seldom, if ever, be afforded the protection of the Fourth Amendment *as*

regards criminal prosecution against them if landlords granted carte blanche authority to law enforcement agents to search.

Assuming arguendo the landlord had a right to enter the premises and take the civil steps necessary to enjoin any waste being committed therein, such could be used in a criminal prosecution against the tenant if he timely asserts his rights under the Fourth Amendment.

Constitutional rights should have the force of cutting across contractual rights when the need arises as is found in the instant situation.

Here, there was an unwarranted invasion of the lessees rights under the Fourth Amendment. The precedent that will be set if the judgment of the lower court is affirmed will tear away the protective cloak of a defendant in a criminal case that was so many, many years in the weaving. The net pain to law enforcement in no way outweighs this right of a tenant. This could never be truer than now when there are thousands, even millions, who occupy their "houses" (Amendment IV) under some form of lease, a rental contract or security arrangement whereby title to the fee is rested in the lender.

Conclusion

It is respectfully submitted that the judgment of the United States Court of Appeals for the Fifth Circuit be vacated and set aside and that this case be remanded to the United States District Court for the Middle District of Georgia with instructions to vacate and set aside the judgment and commitment with instruction to enter an appropriate order suppressing the evidence illegally obtained from the house.

Certificate of Service

I, J. Sewell Elliott, certify that I have, on the date shown below, served a true copy of the within brief of petitioner by mail upon the Solicitor General, Department of Justice, Washington, 25, D. C. by depositing same in a United States Post Office with sufficient air mail postage, prepaid, addressed to him at his Post office address, in accordance with Rule 33(1), Supreme Court Rules.

This 19th day of November 1960.

J. Sewell Elliott

Brief respectfully submitted;

J. Sewell Elliott
Suite 506 Persons Building
Macon, Georgia
Counsel for Petitioner

Appendix

Constitutional Provisions

Constitution of the United States

Amendment IV—Searches and Seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Statutes

Section 5174, Internal Revenue Code of 1954—

Registry of stills.

(a) Every person having in his possession or custody, or under his control, any still or distilling apparatus set up, shall register such still or apparatus with the Secretary or his delegate immediately on its being set up, by subscribing and filing with the Secretary or his delegate a statement, in writing, setting forth the particular place where such still or distilling apparatus is set up, the kind of still and its cubic contents, the owner thereof, his place of residence, and the purpose for which said still or distilling apparatus has been or is intended to be used: Provided, That stills or distilling apparatus not used or intended to be used for the distillation, redistillation, or recovery of distilled spirits are not required to be registered under this section.

Section 5601, Internal Revenue Code of 1954—Penalty and forfeiture for possession of unregistered still or distilling apparatus.

Every still or distilling apparatus not registered as required by section 5174, together with all personal property in the possession or custody or under the control of the person required by section 5174 to register the still or distilling apparatus, and found in the building, or in any yard

or inclosure connected with the building in which the same may be set up, shall be forfeited. Every person having in his possession or custody, or under his control, any still or distilling apparatus set up which is not registered, as required by section 5174 shall pay a penalty of $500, and shall be fined not more than $1,000, and imprisoned not more than 2 years. Aug. 16, 1954, 9:45 a. m., E.D.T., c. 736, 68A Stat. 683.

Section 5606, Internal Revenue Code of 1954—Penalty and forfeiture for distilling without giving bond

Any person who shall carry on the business of a distiller without having given bond as required by law, or who shall engage in or carry on the business of a distiller with intent to defraud the United States of the tax on the spirits distilled by him, or any part thereof, shall, for every such offense, be fined not more than $5,000 and imprisoned not more than 2 years. All distilled spirits or wines, and all stills or other apparatus, fit or intended to be used for the distillation or rectification of spirits, or for the compounding of liquors, owned by such person, wherever found, and all distilled spirits or wines and personal property found in the distillery or in any building, room, yard, or inclosure connected therewith, and used with or constituting a part of the premises, and all the right, title, and interest of such person in the lot or tract of land on which such distillery is situated, and all right, title, and interest therein of every person, who knowingly has suffered or permitted the business of a distiller to be there carried on, or has connived at the same; and all personal property owned by or in possession of any person who has permitted or suffered any building, yard, or inclosure, or any part thereof, to be used for purposes of ingress or egress to or from such distillery, which shall be found in any such building, yard, or inclosure, and all the right, title, and interest of every person in any premises used for ingress or egress to or from such distillery, who has knowingly suffered or permitted such premises to be used for such ingress or egress, shall be forfeited to the United States.

Rule 41(e). Motion for Return of Property and to Suppress Evidence.

A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground that (1) the property was illegally seized without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

FILE COPY

PETITION NOT PRINTED

Office-Supreme Court, U.S.
FILED
DEC 30 1960
JAMES R. BROWNING, Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1960

ELMER SAMUEL CHAPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

J. LEE RANKIN,
Solicitor General,
MALCOLM RICHARD WILKEY,
Assistant Attorney General,
BEATRICE ROSENBERG,
KIRBY W. PATTERSON,
Attorneys,
Department of Justice, Washington 25, D.C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Question presented	2
Constitutional provision, statute and rule involved	2
Statement	3
Summary of argument	8
Argument	10
I. In the circumstances here shown, the owner had the right to enter the premises and to enlist the assistance of officers in doing so	11
A. The right of a landlord to enter rented premises in appropriate circumstances is deeply rooted in the common law	12
B. Petitioner's use of the premises gave the landlord a right to possession under local law	14
C. The landlord had the right to enlist the assistance of officers in entering the premises	17
II. Since the entry of the officers was lawful, the seizure of the still was proper	18
Conclusion	19

CITATIONS

Cases:

Abel v. *United States*, 362 U.S. 217	19
Bagshaw v. *Gaward*, Yelverton 96	13
Bashinski v. *The State*, 123 Ga. 508, 51 S.E. 499	14

Cases—Continued

	Page
Baskin v. *Meadors*, 196 Ga. 802; 27 S.E. 2d 696	14
Cradle v. *United States*, 178 F. 2d 962, certiorari denied, 339 U.S. 929	19
Elder v. *Camp*, 193 Ga. 320, 18 S.E. 2d 622	17
Elkins v. *United States*, 364 U.S. 206	10
Ellison v. *United States*, 206 F. 2d 476	19
Fisher v. *United States*, 205 F. 2d 702	19
Foster v. *Vickery*, 202 Ga. 55, 42 S.E. 2d 117	17
Harris v. *United States*, 331 U.S. 145	19
Kaufman v. *Clark*, 7 D.C. 1	15
Kreuter v. *United States*, 201 F. 2d 33	16
Kropp Forge Co. v. *Employers' Liability Assurance Corp.*, 159 F. 2d 536	16
Kurrus v. *Seibert*, 11 Ill. App. 319	15
Markham v. *David Stevenson Brewing Co.*, 51 App. Div. 463	15
Marron v. *United States*, 275 U.S. 192	19
Martin v. *Medlin*, 81 Ga. App. 602, 59 S.E. 2d 519	16
Paper v. *United States*, 53 F. 2d 184	19
Parrott v. *Barney*, Fed. Cas. No. 10,773a	13
Proud v. *Hollis*, 8 English Common Law Reports 4, 5 (1 B. and C. 8)	13
Rivers v. *The State*, 118 Ga. 42, 44 S.E. 859	14
Sackett v. *Suckett*, 8 Pick. (Mass.) 309	13
Six Carpenters' Case, 8 Coke 146a	13
Smith v. *Hightower*, 80 Ga. App. 293, 55 S.E. 2d 872	15
Thruston v. *Mustin*, Fed. Cas. No. 14,013	13
Turner v. *Deming*, 155 F. 2d 181, certiorari denied, 329 U.S. 727	14
United States v. *Joines*, 258 F. 2d 471, certiorari denied, 358 U.S. 880	19
United States v. *Lee*, 274 U.S. 559	18
United States v. *Rabinowitz*, 339 U.S. 56	19
White v. *Thurber*, 55 Hun (N.Y.) 447	15

Constitution, statutes and rule:	Page
Fourth Amendment to Constitution of the United States	2, 10
23 Ga. Code 1403	17
24 Ga. Code 2813	17
58 Ga. Code 106	2, 14
58 Ga. Code 109	14
Statute of Gloucester, 6 Edw. I, Chap. 5. (1278)	13
Rule 41(e), F.R. Crim. P.	2
Miscellaneous:	
Anderson, *Sheriffs, Coroners and Constables*, p. 4	17
4 Kent, *Commentaries*, 82	13
Murfree, *Sheriffs*, Section 1172	17
Tiffany, *Landlord and Tenant* (1910 ed.)	12
Y.B. 8 Hen. 6, 29(B)	13
Y.B. 11 Hen. 4, 75(B)	13

In the Supreme Court of the United States

OCTOBER TERM, 1960

No. 175

ELMER SAMUEL CHAPMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the court of appeals affirming petitioner's conviction (R. 79–82) is reported at 272 F. 2d 70. The opinion of the court of appeals denying a petition for rehearing (R. 86–87) is reported at 273 F. 2d 412.

JURISDICTION

The judgment of the court of appeals was entered on December 1, 1959 (R. 83). A petition for rehearing was denied on January 7, 1960 (R. 86). The petition for a writ of certiorari was filed on February 6, 1960, and granted on June 27, 1960 (R. 87; 363 U.S. 836). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, there was an unreasonable search and seizure.

CONSTITUTIONAL PROVISION, STATUTE AND RULE INVOLVED

The Fourth Amendment to the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

58 Georgia Code 106 provides:

> The unlawful manufacture, sale or keeping for sale or disposition of any of the liquors and beverages mentioned in section 58-101, contrary to the law of the State, shall, at the option of the landlord, work a forfeiture of the rights of any lessee or tenant under any lease or contract for rent of the premises when such unlawful act is performed by the lessee or tenant, or by any agent, servant, clerk or employee of the lessee or tenant with the latter's knowledge or permission.

Rule 41(e), F.R. Crim. P., provides:

> A person aggrieved by an unlawful search and seizure may move the district court for the district in which the property was seized for the return of the property and to suppress for use as evidence anything so obtained on the ground

that (1) the property was illegally seized, without warrant, or (2) the warrant is insufficient on its face, or (3) the property seized is not that described in the warrant, or (4) there was not probable cause for believing the existence of the grounds on which the warrant was issued, or (5) the warrant was illegally executed. The judge shall receive evidence on any issue of fact necessary to the decision of the motion. If the motion is granted the property shall be restored unless otherwise subject to lawful detention and it shall not be admissible in evidence at any hearing or trial. The motion to suppress evidence may also be made in the district where the trial is to be had. The motion shall be made before trial or hearing unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion at the trial or hearing.

STATEMENT.

Petitioner was convicted in the United States District Court for the Middle District of Georgia on three counts of an indictment charging the illegal operation of a distillery (R. 1–2, 3). He was sentenced, on May 1, 1959, to imprisonment for a year and a day on count 1. Sentence was suspended on counts 2 and 3, and he was placed on probation for a period of five years, to run concurrently with his sentence on count 1 (R. 76–77). The court of appeals affirmed, 272 F. 2d 70 (R. 79–82).

The issue before this Court arises out of the denial of a motion to suppress the evidence of the illegal still.

1. The property involved was leased through a real estate agency for forty dollars a month by a Mr. Lowe, subsequently identified as petitioner (R. 37, 43, 74–75). The property originally belonged to Mr. Bridgeman and Mrs. Herbert. Bridgeman acquired Mrs. Herbert's interest at about the time of the occurrence in question, but he was not certain whether it was before or afterward (R. 73). On the land, there is a five- or six-room house set back in the woods some two to three hundred feet from a road known as the "Airport Cross Road" or the "Herbert Smart Road." There are other houses, used as residences, up and down the road (R. 25–26, 46, 63).

On Sunday, February 16, 1958, the church to which Mr. Bridgeman belonged had scheduled a "visitation," *i.e.*, a program for becoming acquainted with new members of the community. The pastor asked Bridgeman to call on a family who had recently moved into the neighborhood. Bridgeman said that he would do so, but that he would first visit the people who had moved into his house. When Bridgeman arrived at the house, that afternoon, he found all the shades drawn at the windows.[1] He knocked at the door, but nobody answered (R. 71–72). He testified (R. 72) that he smelled "an awful scent" and he "just knowed what it was by smelling of it." He looked into the open base-

[1] Apparently, Bridgeman was accompanied by an unidentified member of his church..

ment of the house and saw nothing there. After visiting the other family he had been requested to see, he returned to his home and called a state revenue officer, saying he would show him a still (R. 71–72, 8).

The state agent picked up a county policeman and they accompanied Bridgeman to the rented house (R. 9, 46). As they approached, they noticed a strong odor of whiskey mash (R. 27, 41, 46, 53). Bridgeman gave the state officers permission to enter[2] and the county policeman crawled through an unlocked window into the bathroom (R. 9–10, 46, 62, 72). What he saw there was described by him and by others later admitted to the house. Some of the partitions between the rooms had been torn out so that, standing at the front door, a person could view almost the entire house. The bathroom was exposed and the water was running from there to a large still installed in the living room. Vats were fastened to the chimney, and barrels and firewood were on the floor. The pump was nailed to the dining room floor. The

[2] The language of the witness varied in describing how permission was granted. The state agent testified that Bridgeman "told us to go in the window and see what was in there, so we went on in" (R. 13). The county policeman said that Bridgeman gave him permission to go in (R. 46) and that he instructed them to go in (R. 62). Bridgeman testified that he said, "If it's what I think it is, what it smells like, yes, you can have my permission to go in" (R. 72). Petitioner concedes that permission to enter was given by Bridgeman (Pet. 2–3, 6, 7). The district court found, on the motion to suppress, that Bridgeman requested the officers to go in, which finding was affirmed on appeal (R. 81) and on motion for rehearing (R. 86–87).

575940—60——2

officers found approximately 1300 gallons of mash. There was nothing in the house except the things that went with the still and a few small items of food. There was no furniture, bedding, or clothing or anything to indicate that anyone was living there (R. 19–22, 33–34, 38, 40–41, 68).

2. The county policeman remained in the house while the state agent returned Bridgeman to his home and enlisted the aid of federal agents in taking over the still. In the interim, a car drove up to the house and two men got out and unlocked the front door. The policeman attempted to arrest both of them, but succeeded only in detaining the petitioner (R. 11–12, 16, 30–32, 47–49).

Petitioner stated to the policeman that he had come to the house in order to go to the bathroom. He said that he knew who the other man was, but that he would rather not name him. The following morning, after being advised of his right to remain silent, he said, first, that he had gone there to see about renting the house, and, later, that he had gone there to see about buying some whiskey (R. 70–71).

Keys in petitioner's possession fitted the front door of the house (R. 49–50). A Mercury hub cap found on top of the still fitted the Mercury automobile in which petitioner had arrived. The car had a hub cap missing. The floor board in the back and the trunk of the car had particles of sugar and wheat bran on them (R. 69).

3. Petitioner's original motion to suppress, filed October 20, 1958, alleged (R. 3) that he:

> * * * does move this court to suppress for use all evidence obtained by an unlawful search and seizure of a private dwelling without warrant. This defendant does specifically disclaim that said dwelling was his own or that it was under his custody and control at the time of the search but does admit that he leased said premises for a friend and not for his own use and does rely upon this motion in view of the obvious contention of the United States of America to the contrary.

On April 20, 1959, petitioner moved to amend the motion (R. 4):

> * * * by deleting from the body of said Motion (1) the wording "of a private dwelling" and (2) the second sentence thereof and inserting in its stead the following:
>
> "This defendant does show that said unlawful search and seizure was effectuated on February 16, 1958, upon premises known as the Bridgman house, Airport Cross Road, Macon, Georgia. Petitioner does show that at the time of said search he was the lessee of the premises."

Defense counsel offered in evidence pictures of the house in question. When asked by the court why the petition was amended to strike the description of it as a dwelling, counsel stated (R. 7):

> Because, Your Honor, that is the house that we are referring to. Mr. Chapman had not visited that house for sometime, although he had a right to do so, and it is not within—he

> is not able to allege either one way or the other as to whether it was a residence at that time or not, or whose residence it was.

At the conclusion of the evidence on the motion to suppress, counsel stated his position as follows (R. 60):

> I am standing on the fact that this man leased a house which is described in the pictures that I have introduced into evidence and which evidence shows was a residential type house, not a place of business, such as a barn or shed or something of that sort, but a residential type house in a residential district with other houses around it which were occupied, and that [defendant] was the lessee of that house.

SUMMARY OF ARGUMENT

I

The owner of the property in question rightfully came on the land to pay his tenant a social call. Finding to his satisfaction and with good reason that the property was being misused for the purposes of operating an illicit still, he called upon officers of the law to assist him in entering the building. It is the government's position that this entry was proper, in the circumstances shown, and was made as a matter of right.

The right of a landlord to enter rented premises under appropriate circumstances has always been recognized. He may enter to demand payment of rent, to determine whether waste has been committed, to make necessary repairs, to post notice of non-liability for mechanics' liens, or to comply with lawful requirements of local or state authorities. The exercise

of the landlord's prerogative would appear most strongly justified where there is well-founded reason to believe that his property is being grossly abused. Finding the building unoccupied and smelling strongly of whiskey mash, the landlord, we submit, had the right himself to make immediate investigation by entering either through an unlocked door or an unlocked window. Had he done so, his testimony as to what he thereupon saw in full view would have been admissible.

The landlord's right to enter in the circumstances of this case is also supported by provisions of Georgia law which make the operation of an illicit still a nuisance and give the owner a right to immediate possession. Petitioner, moreover, is in no position to assert any special right based upon occupancy of a dwelling house. He did not so occupy it and it did not appear at the time that he so occupied it. He himself took the position in the trial court that his rights were based solely on the oral rental agreement, deleting from his motion to suppress an original reference to the building as a "private dwelling." Petitioner procured the agreement upon which he bases his claimed right by fraudulent misrepresentations as to his identity and as to the purpose for which he was going to use the property. The agreement was therefore vitiated from the outset.

If, as we believe, the landlord had the right to enter the premises to investigate an apparent and a grave misuse of his property, he was not required to do so alone and under circumstances which might entail

serious physical danger. He was entitled to receive the protection and assistance of law officers in so doing. The officer who actually went through the unlocked window was a peace officer, having such an officer's traditional powers to protect life and property. The right of the landlord to enter and to enlist the assistance of officers in so doing does not mean that such a right exists under any and all circumstances. But it existed here, where he had every reason to believe that his premises were being wasted and where common prudence suggested that he should have the protection of the law in making the necessary investigation.

II

Since the entry of the officers was proper, their testimony as to the existence of the illicit still (which was completely open to view) was admissible. They had a right to seize contraband which they had lawfully come upon. Moreover, the actual seizure came only after petitioner's arrest and was incidental thereto.

ARGUMENT

The only question in this case is whether, in the particular circumstances shown, there was an unreasonable search and seizure under the standards of the Fourth Amendment. Even though the decisions of the courts below were rendered before the decision of this Court in *Elkins* v. *United States*, 364 U.S. 206, the fact that state officers conducted the search played no part in the lower courts' determination. The admissibility of the evidence was explicitly rested on the

determination that the search and seizure were reasonable, in the circumstances, under federal standards.

That is the view of the government here. Our position is that when the landlord, paying a social call, found good reason to believe that the leased premises were being wasted and used for criminal purposes, he had authority to enter as a matter of right and to bring officers with him for this purpose. The fact that the building was not actually used as a dwelling, and that petitioner's motion did not even claim that it was, serves to support the reasonableness of the action taken by the landlord and by the local officers.

I

IN THE CIRCUMSTANCES HERE SHOWN, THE OWNER HAD THE RIGHT TO ENTER THE PREMISES AND TO ENLIST THE ASSISTANCE OF OFFICERS IN DOING SO

Bridgeman went to his property to make a social call, proceeding under the impression that the tenant was a law-abiding citizen using the rented premises as a residence. His own account of the visit was as follows (R. 72):

> So, we went down there to my house to visit these people and they had shades up to the windows and all of the shades was down, but we knocked at the door. Nobody come to the door, so I smelled an awful scent around there and I just knowed what it was by smelling of it. I smelled it before I got to the house, and I walked around the house. It has a basement in the bottom and not closed in, just an open basement. I looked in there and wasn't noth-

> ing in there, and so we went on back and made this other visit. And I went to the house and I picked up the telephone and I called the officers and told them what I thought was there.

The officer who was summoned testified that Bridgeman told him that if he would get out there by five o'clock "he would carry me and show me a still" (R. 8). The officers, upon their arrival, smelled the same telltale odor that Bridgeman had (*supra*, p. 5). At this point, with Bridgeman present and with Bridgeman's consent, the county policeman entered the building through an unlocked window. We urge that, in the circumstances, Bridgeman, as the landlord, was entitled to enter the premises as a matter of right and to repossess his property, and that he could properly call on the officers to assist him in making the entry and effecting the repossession.

A. THE RIGHT OF A LANDLORD TO ENTER RENTED PREMISES IN APPROPRIATE CIRCUMSTANCES IS DEEPLY ROOTED IN THE COMMON LAW

A tenant's right to exclusive possession of the rented premises is subject to some qualifications. Thus, at early common law, it was recognized that the landlord had the right to enter "to view waste." It is noted in Tiffany, *Landlord and Tenant* (1910 ed.), Section 3(b)(2), p. 9:

> The landlord is recognized as having, apart from any stipulation, a right of entry on the land while in the tenant's possession for certain limited purposes. He has the right to enter to demand payment of rent or to levy a distress. It has also been said that he may enter to "view waste," that is, to determine whether waste has

> been committed, provided at least that this does not involve the breaking of windows or doors, or to post a notice of non-liability under the mechanics' lien law. He may, no doubt, enter without being guilty of trespass, for the purpose of complying with police and sanitary orders and regulations, and he will generally be exempt from liability for acts required by the state or municipal authorities.

And see *Proud* v. *Hollis*, 8 English Common Law Reports 4, 5 (1 B. and C. 8).

The right of the landlord to enter to view waste seems to be of very ancient origin, being established as early as the year 1410.[3] The apparent lack of contemporary litigation on the point warrants the assumption that ordinarily the right of a landlord to come upon the premises in order to inspect and to ascertain the condition of his own property has not been questioned.[4] Certainly, the exercise of this prerogative would appear most strongly justified where the landlord has persuasive reason to believe that the tenant is engaged in a most serious—indeed, a criminal—abuse of the tenancy. Here, there was every reason for the landlord to make prompt investigation when he detected the odor of whiskey mash coming strongly through the door of

---

[3] Y.B. 11 Hen. 4, 75(B). See also, Y.B. 8 Hen. 6, 29(B); *Bagshaw* v. *Gaward*, Yelverton 96; *Six Carpenters' Case*, 8 Coke 146a, 146b.

[4] The Statute of Gloucester, 6 Edw. I, Chap. 5 (1278) penalized waste by forfeiture plus treble damages. It has been said that this statute was a part of the common law brought to this country by the colonists. See *Parrott* v. *Barney*, Fed. Cas. No. 10,773a; *Thruston* v. *Mustin*, Fed. Cas. No. 14,013; *Sackett* v. *Sackett*, 8 Pick. (Mass.) 309; 4 Kent, *Commentaries*, 82.

the unoccupied building. The use of the premises for making whiskey portended—as subsequent events established—that the house was being seriously damaged. If the landlord, instead of calling officers to assist him, had himself entered, whether through an unlocked door or through an unlocked window, it could scarcely be contended that his lips would be silenced from testifying as to the scene of destruction which confronted him. As we argue *infra*, pp. 17–18, the rule should be no different because he sought assistance from law enforcement officers.

B. PETITIONER'S USE OF THE PREMISES GAVE THE LANDLORD A RIGHT TO POSSESSION, UNDER LOCAL LAW

Modern statutory and case law also support a right of entry by the landlord[5] to ascertain the use being made of his property. Title 58, section 106, of the Georgia Code provides that the illicit manufacture of distilled liquor on rented premises works a forfeiture of the rights of the lessee or tenant, at the option of the landlord. Such manufacture constitutes a nuisance under Georgia law (58 Ga. Code 109), and knowing permission by the landlord of such use will justify "padlocking" the premises. *Baskin* v. *Meadors*, 196 Ga. 802, 27 S.E. 2d 696; *Bashinski* v. *The State*, 123 Ga. 508, 511, 51 S.E. 499; *Rivers* v. *The State*, 118 Ga. 42, 44 S.E. 859. Furthermore, a landlord has the right to enter for the purpose of making necessary

[5] There is no substance to petitioner's intimation that Bridgeman's rights were diminished because he may have been the owner of only a "half interest". Tenants in common are seized "per my et per tout". See *Turner* v. *Deming*, 155 F. 2d 181 (C.A. D.C.), certiorari denied, 329 U.S. 727.

repairs. *Smith* v. *Hightower*, 80 Ga. App. 293, 55 S.E. 2d 872, 874–875. See, also, *White* v. *Thurber*, 55 Hun (N.Y.) 447; *Markham* v. *David Stevenson Brewing Co.*, 51 App. Div. 463, 466; *Kaufman* v. *Clark*, 7 D.C. 1, 2.[*] Such repairs would obviously be necessary if the premises had been converted into a distillery. For these reasons—that the premises were apparently being used to perpetrate a nuisance which it was the landlord's duty under the law to abate and which would justify his reassuming full control of the premises—Mr. Bridgeman, on the basis of his own authority and his own proprietary rights, had the right to take reasonable steps to determine conclusively the use that was being made of his property.

The reasonableness of the action by Bridgeman is further emphasized by the fact that he had good reason to believe that the property was not being used as a dwelling house at all—the purpose for which it was let. The house was empty; the shades were drawn; the doors were locked; the open basement was unused. The only thing to indicate that the house was being used at all was the easily recognized odor of whiskey, or whiskey mash, which was so strong that it was immediately evident from out-of-doors.

Petitioner is in no position to assert any special protection attaching to a dwelling house. Indeed, he admitted as much in the district court when he amended his motion to suppress so as to delete the allegation that the house was a private dwelling.

---

[*] As to the common law right of a landlord to effect entry in order to abate a nuisance, see *Kurrus* v. *Seibert*, 11 Ill. App. 319.

Petitioner's standing to object to the entry is based squarely on the rental agreement, or oral lease, entered into with the owners. The correlative rights and duties of landlord and tenant in the particular circumstances were therefore pertinent in determining the propriety of Bridgeman's conduct on the afternoon of February 16, 1958, when he requested officers to accompany him to the rented premises. In this connection, it should be noted that petitioner's claim to rightful possession of these premises was founded upon an oral agreement which he entered under the fictitious name of "J. B. Lowe." The use of an assumed name does not invalidate an agreement except where such use is employed for the purpose of defrauding the other party. *Kropp Forge Co.* v. *Employers' Liability Assurance Corp.*, 159 F. 2d 536, 538 (C.A. 7); *Kreuter* v. *United States*, 201 F. 2d 33, 35 (C.A. 10). But here a purpose to defraud is readily inferred. The false identity would obviously make it difficult to trace petitioner and hold him accountable for damage to the premises upon the discontinuance of the illicit operations. Moreover, petitioner had apparently violated the agreement from its inception by devoting the property to an illegal use. *Martin* v. *Medlin*, 81 Ga. App. 602, 59 S.E. 2d 519, 521. Since these violations of the agreement would constitute a good defense to any action by petitioner against Bridgeman for trespass, they are material for purposes of showing that, as between petitioner and Bridgeman, petitioner has no right to complain of the entry.

C. THE LANDLORD HAD THE RIGHT TO ENLIST THE ASSISTANCE OF OFFICERS IN ENTERING THE PREMISES

It was, we submit, normal prudence on Bridgeman's part to call on law enforcement officers[7] before attempting the possibly perilous undertaking of entering the building. If he had found himself confronted by the operators of the still, as the county policeman was later that afternoon, he might well have been placed in physical danger. Certainly, the law does not require foolhardiness in the assertion of one's rights. Moreover, if, as we believe, the owner had the authority to enter the premises as a matter of right, he could properly exercise these rights through one to whom he delegated his authority.

This does not mean broadly, as petitioner suggests, that consent of the landlord is all that is called for in order to dispense with the necessity of a search warrant. A landlord has no right to invade a tenant's privacy whenever he sees fit, and he cannot confer on officers a right of entry which he does not himself have. Certainly, a landlord would have no right, for example, to rummage through papers of his tenant and could confer no such right on officers. All that we argue

[7] The officer who entered through the bathroom window was a county policeman, an officer who has the same powers and duties as a peace officer that a sheriff has (23 Ga. Code 1403). The sheriff has the common law duties of that office, except as modified by statute, including the power and duty to preserve the peace. 24 Ga. Code 2813; *Elder* v. *Camp*, 193 Ga. 320, 18 S.E. 2d 622; *Foster* v. *Vickery*, 202 Ga. 55, 42 S.E. 2d 117. The substance of the duty of a peace officer is to protect life and property. Anderson, *Sheriffs, Coroners and Constables*, p. 4; Murfree, *Sheriffs*, Section 1172.

is that in this case, in the particular circumstances which Bridgeman found when he came to pay his social call, Bridgeman, as landlord, had a right to enter the premises himself and therefore to confer such right of entry upon the officers. Bridgeman, who had let his premises for a lawful purpose, called in the officers only when he reasonably believed that his premises were being gravely abused pursuant to a criminal enterprise. He had a right to call on them to effect an entry which he had a right himself to make.*

II

SINCE THE ENTRY OF THE OFFICERS WAS LAWFUL, THE SEIZURE OF THE STILL WAS PROPER

If the entry into the house by the officers was proper, there can be no serious question of their authority to seize the still which they saw upon their entry. The officers, we emphasize, did not conduct a search after the entry; the still was in full view. See *United States* v. *Lee*, 274 U.S. 559, 563; *Ellison* v.

* If we are correct in our view that the officers' authority to enter is derived, on the facts of the instant case, from the landlord's right to do so, the question whether there was time to procure a warrant cannot be decisive. It is to be noted in this connection (see Point II, *infra*) that no search was made and that the items seized as contraband were open to plain view. We note further that the only evidence as to whether a warrant was in fact obtainable without substantial delay was the testimony of the state officer who stated that he did not think he could have obtained a warrant on a Sunday. R. 13. The same officer testified further (*ibid.*) that he did not believe that he was obliged to seek a warrant inasmuch as he had permission to enter from the owner of the house.

United States, 206 F. 2d 476, 478 (C.A. D.C.); *Cradle* v. *United States*, 178 F. 2d 962 (C.A. D.C.), certiorari denied, 339 U.S. 929; *Fisher* v. *United States*, 205 F. 2d 702 (C.A.D.C.). And the officers had a right to seize contraband which they had lawfully come upon. *Marron* v. *United States*, 275 U.S. 192; *Harris* v. *United States*, 331 U.S. 145; *United States* v. *Joines*, 258 F. 2d 471 (C.A. 3), certiorari denied, 358 U.S. 880; *Paper* v. *United States*, 53 F. 2d 184, 185 (C.A. 4).

Moreover, before the actual seizure was made, petitioner had arrived and had been apprehended. The seizure was also justifiable, therefore, as incidental to his arrest. *Abel* v. *United States*, 362 U.S. 217, 235; *United States* v. *Rabinowitz*, 339 U.S. 56; *Harris* v. *United States*, 331 U.S. 145.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the judgment below should be affirmed.

J. Lee Rankin,
Solicitor General.
Malcolm Richard Wilkey,
Assistant Attorney General.
Beatrice Rosenberg,
Kirby W. Patterson,
Attorneys.

December 1960.

U.S. GOVERNMENT PRINTING OFFICE 1960

SUPREME COURT OF THE UNITED STATES

No. 175.—October Term, 1960.

Elmer Samuel Chapman, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 3, 1961.]

Mr. Justice Whittaker delivered the opinion of the Court.

Acting without a warrant but with the consent of the petitioner's landlord, Georgia law enforcement officers entered—through an unlocked window—and searched petitioner's rented house, in his absence, and there found and seized an unregistered "distillery" and 1,300 gallons of "mash." Soon afterward petitioner was indicted in the District Court for the Middle District of Georgia for violations of the federal liquor laws.[1] He promptly moved the court for an order suppressing the use of the seized items as evidence at his impending criminal trial on the ground that they were obtained by an unlawful search and seizure. After hearing evidence, the court held that the search and seizure were lawful under federal standards and denied the motion.

At the subsequent trial, the evidence sought to be suppressed was offered and received, over petitioner's renewed objections. Upon that evidence, the jury found petitioner guilty, and the court sentenced him to imprisonment for a year and a day. On appeal, the Court of Appeals for the Fifth Circuit affirmed. 272 F. 2d 70. To examine petitioner's claim that the courts below violated the standards governing admissibility of timely

[1] 26 U. S. C. §§ 5601, 5606.

challenged evidence in federal courts, we granted certiorari. 363 U. S. 836.

The relevant evidence is not controverted. It shows the following: One Bridgaman, and another, owned a dwelling house in a wooded area near the Macon, Georgia, airport, which they commonly rented through a rental agency. Understanding that the house had been rented to a new tenant, Bridgaman, on Sunday, February 16, 1958, went to the house for the purpose of inviting the tenants to attend church. Upon arrival he noted a strong "odor of mash" about the house. There was no response to his knock, and although he tried to do so, he was unable to see into the house. He then returned to his home and by telephone, advised the local police department of his observations. Soon afterward two local police officers, Harbin and Chance, arrived at Bridgaman's home, and the three then went to the rented house. They noticed a strong odor of "whiskey mash" coming from the house. After their knock at the door failed to produce a response, they walked around the house and tried to look into it but were unable to do so "because the shades were down." They found that all of the windows were locked, save one in the bathroom. The officers testified that Bridgaman told them "to go in the window and see what was in there." Bridgaman's version of what he said was: "If it's what I think it is, what it smells like, yes, you can have my permission to go in." Thereupon they opened the bathroom window and, with the assistance of Bridgaman and Chance, Harbin entered the house through that opening. Upon entering the house he saw a complete and sizable distillery and 1,300 gallons of mash located in the living room. Apart from some accessories, containers and fire wood, there was nothing else in the house. Harbin then called to Chance that he had found a large still and asked him "to go get some help." Chance immediately left—dropping Bridgaman at

his home—to call the federal officers. While the federal officers were enroute to the house, petitioner drove up, unlocked the front door, entered the house and was immediately arrested by Harbin. The federal officers soon arrived and took custody of petitioner. They also saved samples of the mash, took various pictures of the scene and then destroyed the still and its contents. Neither the state nor the federal officers had any warrant of any kind.

Although the decisions below were rendered prior to this Court's decision in *Elkins* v. *United States*, 364 U. S. 206, the doctrine of that case is not here involved, as the lower courts explicitly rested their determinations on the ground that the search and seizure, though made by state officers, were valid under federal standards. Hence, the only question here is whether those determinations were correct. We believe that they were not.

The Fourth Amendment to the United States Constitution provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Until *Agnello* v. *United States*, 269 U. S. 20, this Court had never directly decided, but had always assumed, "that one's house cannot lawfully be searched without a search warrant, except as an incident to a lawful arrest therein" (*id.*, at 32), but that case explicitly decided that "Belief, however well founded, that an article sought is concealed in a dwelling house furnishes no justification for a search of that place without a warrant. And such searches are . . . unlawful notwithstanding facts unquestionably showing probable cause." *Id.*, at 33.

At least two decisions of this Court are closely relevant. *Taylor* v. *United States*, 286 U. S. 1, and *Johnson* v. *United States*, 333 U. S. 10. In the *Taylor* case Federal agents had received "complaints" respecting activities at a certain garage in Baltimore and decided to "investigate." As they "approached the garage they got the odor of whiskey coming from within." Looking through a small opening, they saw a number of cardboard cases. Although they had no warrant of any kind, they "broke the fastening upon a door, entered and found one hundred twenty-two cases of whiskey. No one was within the place and there was no reason to think otherwise. While the search progressed, Taylor came from his house and was put under arrest. The search and seizure were undertaken with the hope of securing evidence upon which to indict and convict him." *Id.*, at 5.

In condemning that search and seizure, this Court said that the officers "had abundant opportunity [to obtain a warrant] and to proceed in an orderly way even after the odor had emphasized their suspicions; there was no probability of material change in the situation during the time necessary to secure such warrant. Moreover, a short period of watching would have prevented any such possibility. . . . Prohibition officers may rely on a distinctive odor as a physical fact indicative of possible crime; but its presence alone does not strip the owner of a building of constitutional guarantees against unreasonable search.'" The Court concluded that "in any view, the action of the agents was inexcusable and the seizure unreasonable. The evidence was obtained unlawfully and should have been suppressed." *Id.*, at 6.

In the *Johnson* case, state narcotic agents, while in the hallway of a hotel, recognized a strong odor of burning opium coming from a particular room. Without knowing who was occupying the room, they knocked and,

after some delay, the door was opened. The agents then entered the room and told the occupant "to consider [herself] under arrest because we are going to search the room." The search produced incriminating opium and smoking apparatus which was warm from recent use. The District Court refused to suppress that evidence and admitted it over defendant's objection at the trial and she was convicted. In reversing, this Court said:

> "The point of the Fourth Amendment, which often is not grasped by zealous officers, is not that it denies law enforcement the support of the usual inferences which reasonable men draw from evidence. Its protection consists in requiring that those inferences be drawn by a neutral and detached magistrate instead of being judged by the officer engaged in the often competitive enterprise of ferreting out crime. Any assumption that evidence sufficient to support a magistrate's disinterested determination to issue a search warrant will justify the officers in making a search without a warrant would reduce the Amendment to a nullity and leave the people's homes secure only in the discretion of police officers. . . . The right of officers to thrust themselves into a home is also a grave concern, not only to the individual but to a society which chooses to dwell in reasonable security and freedom from surveillance. When the right of privacy must reasonably yield to the right of search is, as a rule, to be decided by a judicial officer, not by a policeman or government enforcement agent.
>
> "There are exceptional circumstances in which, on balancing the need for effective law enforcement against the right of privacy, it may be contended that a magistrate's warrant for search may be dispensed with. But this is not such a case." 333 U. S., at 13–15.

Here, as in that case, "No reason is offered for not obtaining a search warrant except the inconvenience to the officers and some slight delay necessary to prepare the papers and present the evidence to a magistrate. These are never very convincing reasons and, in these circumstances, certainly are not enough to by-pass the constitutional requirement. No suspect was fleeing or likely to take flight. The search was of permanent premises, not of a movable vehicle. No evidence or contraband was threatened with removal or destruction, except perhaps the fumes which we suppose in time would disappear." 333 U. S., at 15.

We think it must be concluded here, as it was in *Johnson*, that "If the officers in this case were excused from the constitutional duty of presenting their evidence to a magistrate, it is difficult to think of a case in which it should be required." 333 U. S., at 15. See also *Lustig* v. *United States*, 338 U. S. 74; *United States* v. *Rabinowitz*, 339 U. S. 56; *United States* v. *Jeffers*, 342 U. S. 48; *Jones* v. *United States*, 357 U. S. 493.

Actually, the Government does not contend in this Court that this search and seizure, as such, met the standards of the Fourth Amendment. Instead it says: "Our position is that when the landlord, paying a social call, found good reason to believe that the leased premises were being wasted and used for criminal purposes, he had authority to enter as a matter of right and to bring officers with him for this purpose." It says that, under the common law, a landlord has an absolute right to enter the demised premises "to view waste," and that he should be able to exercise that right through law enforcement officers to whom he has delegated his authority. But it cites no Georgia or other case holding that a landlord, in the absence of an express covenant so permitting, has a right forcibly to enter the demised premises without the

consent to the tenant "to view waste." And so far as our research discloses, no Georgia case so holds.

The only relevant authority cited by the Government is a statement from Tiffany, Landlord and Tenant, (1910 ed.), § 3 (b)(2), p. 9, that "It has also been said that [the landlord] may enter to 'view waste' that is to determine whether waste has been committed, *provided, at least that this does not involve the breaking of windows or doors* . . ." (Emphasis added.) There are several answers to this contention. First, here the landlord and the officers forced open a window to gain entry to the premises. Second, "their purpose in entering was [not to view waste but] to search for distilling equipment . . ." *Jones* v. *United States*, *supra*, at 357. Third, to uphold such an entry, search and seizure "without a warrant would reduce the [Fourth] Amendment to a nullity and leave [tenant's] homes secure only in the discretion of [landlords]." *Johnson* v. *United States*, *supra*, at 14. Moreover, "It is unnecessary and ill-advised to import into the law surrounding the constitutional right to be free from unreasonable searches and seizures subtle distinctions, developed and refined by the common law in evolving the body of private property law which more than almost any other branch of law, has been shaped by distinctions whose validity is largely historical. [W]e ought not to bow to them in the fair administration of the criminal law. To do so would not comport with our justly proud claim of the procedural protections accorded to those charged with crime." *Jones* v. *United States*, 362 U. S. 257, 266, 267.

After pointing to the fact that a Georgia statute (Title 58 Ga. Code § 106) provides that the unlawful manufacture of distilled liquor on rented premises shall work a

[1] Only ancient English cases are cited in support of the text.

forfeiture of the rights of the tenant, at the option of the landlord, and that another, (Title 58 Ga. Code § 109) provides that use of a structure for that purpose constitutes a nuisance, the Government argues that, inasmuch as he used the demised premises for the illicit manufacture of distilled liquor, petitioner had forfeited all rights in the premises, and the landlord thus acquired the right forcibly to enter to abate the nuisance, and that he could and did delegate that right to the officers. But it is clear that, before the officers made the forcible entry, the landlord did not know that the premises were being used for the manufacture of liquor, nor had he exercised his statutory option to forfeit the tenancy for such a cause. And the Supreme Court of Georgia has held that a proceeding to abate a nuisance under § 109 "must proceed for the public on information filed by the solicitor general of the circuit." *Kilgore* v. *Paschall*, 202 Ga. 416, 43 S. E. 2d. 520, 521.

It follows that this search was unlawful, and since evidence obtained through that search was admitted at the trial, the judgment of the Court of Appeals must be

Reversed.

MR. JUSTICE BLACK concurs in the result.

SUPREME COURT OF THE UNITED STATES

No. 175.—October Term, 1960.

Elmer Samuel Chapman, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 3, 1961.]

Mr. Justice Frankfurter, concurring in the judgment.

Since searches and seizures play such a frequent role in federal criminal trials, it is most important that the law on searches and seizures by which prosecutors and trial judges are to be guided should be as clear and unconfusing as the nature of the subject matter permits. The course of true law pertaining to searches and seizures, as enunciated here, has not—to put it mildly—run smooth. The Court's opinion in this case is hardly calculated, I regret to say, to contribute to clarification. The reasoning by which the Court reaches its result would be warranted were *Trupiano* v. *United States*, 334 U. S. 699 (1948), still law. While the Court does not explicitly rely on it, underlying the present decision is the approach of *Trupiano*. That decision was a short-lived deviation from the course of decisions preceding it and it was specifically overruled by *United States* v. *Rabinowitz*, 339 U. S. 56, 66 (1930). Since the *Rabinowitz* case expresses the prevailing view, the decision in this case runs counter to it. The Court does rely on *Johnson* v. *United States*, 333 U. S. 10, although that case was seriously impaired by *Rabinowitz*, 339 U. S., at 66, dissenting opinion, at 85.

Surely it is fair to say that the lower courts and prosecutors have a right to proceed on the assumption, on the basis of controlling decisions, that whether or not a

search is "unreasonable" turns on the circumstances presented by a particular situation, as a matter of substantive determination. On that test I find it very difficult to conclude that a police officer may not deem adequate the authorization of a landlord to enter his house without a search warrant where he has solid ground for believing that his lessee is utilizing the house as an illegal distillery. It seems to me that it is not at all "unreasonable" not to charge a local police officer with knowledge of the law of Georgia regarding the power of a landlord to abate a nuisance in his house. Apart from charging a policeman with knowledge of the local law relating to landlord and tenant, he certainly would not acquire that knowledge by reading the only Georgia case to which the Court's opinion refers, *Kilgore* v. *Paschall*, 202 Ga. 416, 43 S. E. 2d 520, a case which deals with the procedure of a solicitor general of a Georgia circuit in abating a nuisance by an injunction and tells nothing about the remedy of self-help by a landlord.

In joining the Court's judgment, I do so on the basis of the views set forth in my dissents in *Davis* v. *United States*, 328 U. S. 582, 594; *Zap* v. *United States*, 328 U. S. 624, 630; *Harris* v. *United States*, 331 U. S. 145, 155; *United States* v. *Rabinowitz*, *supra*, at 68. As these opinions elucidate, the Fourth Amendment incorporates a guiding history that gives meaning to the phrase "unreasonable searches and seizures" contained within it far beyond the meaning of the phrase in isolation and taken from the context of that history and its gloss upon the Fourth Amendment. The Amendment in its entirety in the setting of that history decidedly does not leave the phrase "unreasonable searches and seizures" at large.

SUPREME COURT OF THE UNITED STATES

No. 175.—October Term, 1960.

Elmer Samuel Chapman, Petitioner, v. United States of America.	On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

[April 3, 1961.]

Mr. Justice Clark, dissenting.

The Constitution condemns only an *unreasonable* search. As my Brother Frankfurter says, that determination "turns on the circumstances presented by a particular situation."[1]

As I read the record, Bridgaman had rented a house to Chapman. On a Sunday morning he called at the house to invite Chapman to church services. However, Bridgaman found Chapman gone, the house locked up and an "awful scent of whiskey mash" all over the place, including an open but empty cellar. He reported these facts to state officers and, at his suggestion, two officers accompanied him to the house. They too smelled, as the Court says, "a strong odor of 'whiskey mash' coming from the house."

Under Georgia law, the use of premises for the manufacture or the keeping of liquor for disposition works "a forfeiture of the rights of any lessee or tenant under any lease or contract for rent . . . ."[2] Bridgaman advised the officers he was the owner of the house, had it leased out, and "instructed" officer Harbin to enter it

[1] I join in his opinion except for the last paragraph in which he concurs in the judgment of the Court.

[2] 58 Ga. Code Ann., 1936, § 106. Aside from eviction, there are no statutory procedural requirements as to forfeiture, the forfeiture operating by virtue of § 106 at the option of the landlord.

and "see what's what in there." The officers found a bathroom window unlocked. Bridgaman "told" the officers "to go in the window" and assisted in "boosting" officer Harbin into the window and on into the house. Inside, the officer found a still set up for operation and 1,300 gallons of whiskey mash in the vats. There was neither household furniture nor other evidence of residential occupancy.

The Court sets aside Chapman's conviction on the ground that this search without a warrant was "unreasonable." For the life of me I cannot see why this is true. I agree with a unanimous Court of Appeals that "under the circumstances of the search here made by the State officers, no illegality was shown."

The "reasonableness" of the search hinges on the rights of the landlord under Georgia law in such a situation. This Court refuses to honor the clear language of § 106, apparently because the Government "cites no Georgia or other case" holding that a landlord may, under the circumstances here, enter on his premises. Instead, it bases its reversal on *Taylor* v. *United States*, 286 U. S. 1, and *Johnson* v. *United States*, 333 U. S. 10, involving entry by officers, unaccompanied by the landlord, into a *home* without a search warrant when there was ample time to secure one. This doctrine, established by *Trupiano* v. *United States*, 334 U. S. 699 (1948), was repudiated and specifically overruled only two years later in *United States* v. *Rabinowitz*, 339 U. S. 56, at 66. Furthermore, none of the cases cited by the Court involve the landlord-tenant circumstance controlling here.

As to Georgia law, the Court itself finds that "no Georgia case" holds that landlords have a right of entry as was exercised by Bridgaman here. It says that, first, the window was forced, second, the entry was for purposes of search and, third, affirmance would "leave [tenant's] homes secure only in the discretion of [land-

lords]." (quoting from *Johnson*, *supra*). The obvious answer to that is: "Chapman was a tenant no more!" The statute provided for the forfeiture of his lease at his lessor's option when he began making whiskey on the premises. And Bridgaman so elected when he directed the officers to enter the house. It was Chapman who was the trespasser, not Bridgaman. The latter was merely repossessing his property, not abating a nuisance. Therefore, § 109 of the Georgia Code, cited by the Court, has no bearing here for that statute merely provides that the Attorney General "may" abate such a nuisance. It has no reference to landlords *qua* landlords. Indeed, the officers here could have abated the nuisance without judicial help by destroying the still and all of its paraphernalia under authority of 58 Ga. Code Ann., 1936 (Cum. Supp. 1958) § 207.[3] Likewise, *Kilgore* v. *Paschall*, 202 Ga. 416, 43 S. E. 2d 520, also cited by the Court, is entirely inapposite. That case merely holds that the special statutory authorization, under an entirely different provision of the Georgia Code, § 110, to close up "blind tigers," *i. e.*, public places of disrepute where gambling, drinking, etc., is carried on, must be brought by the Solicitor of the county wherein they are located. But even if it did hold that actions under § 109 must be brought by the Solicitor, that ruling would have no effect here, precisely because the present factual situation does not come under § 109 but under § 106 and § 207, *supra*.

Furthermore, there was ample reason for not getting a warrant here. It was Sunday afternoon and, as the Georgia officer testified, he had "never got one on Sunday." "I don't think you can." And this was buttressed by his further statements: "Well, I didn't feel no call to

[3] Section 207 provides in pertinent part:

"[W]henever said apparatus [for making liquor is] . . . found or discovered by any sheriff, . . . the same shall be summarily destroyed and rendered useless by him without any formal order of the court."

get one." "The man that owned the house, he was there and he told us to go in the window and see what [']s[] what in there, so we went on in." This shows a complete reliance by the officers on Bridgaman's direction to enter the house. This, I say, made the search entirely reasonable and therefore valid under the Fourth Amendment.

Every moment of every day, somewhere in the United States, a law enforcement officer is faced with the problem of search and seizure. He is anxious to obey the rules that circumscribe his conduct in this field. It is the duty of this Court to lay down those rules with such clarity and understanding that he may be able to follow them. For some years now the field has been muddy, but today the Court makes it a quagmire. It fashions a novel rule, supporting it with an old theory long since overruled. If *Rabinowitz* is no longer law the Court should say so. It is disastrous to law enforcement to leave at large the inconsistent rules laid down in these cases. It turns the well springs of democracy—law and order—into a slough of frustration. It turns crime detection into a game of "cops and robbers." We hear much these days of an increasing crime rate and a breakdown in law enforcement. Some place the blame on police officers. I say there are others that must shoulder much of that responsibility.